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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

QUESTION PRESENTED

Whether 5 U.S.C. 5334(b), which entitles a promoted or transferred government employee to an automatic two-step increase in pay, is applicable to promotions and transfers from positions in the prevailing-rate Wage System (WS) to positions in the General Schedule (GS).

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*The original plaintiffs in this action were Joseph J. Clark, Frank D'Aversa, Nicholas J. Libretto, Nicholas J. Proto, Carlo Scialpi, and Albert Wolfus. Clark and Proto are now deceased; they are represented herein by their widows, Margaret Devine Clark and Annette Kurtzman Proto.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	1
Statement	1
Reasons for granting the petition	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Andrus v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980)	11-12
Apex Hosiery Co. v. *Leader*, 310 U.S. 469	12
Board of Governors of the Federal Reserve System v. *First Lincolnwood Corp.*, 439 U.S. 234	12
Consumer Products Safety Commission v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980)	7
E. I. duPont de Nemours & Co. v. *Collins*, 432 U.S. 46	11
Lewis v. *United States*, 445 U.S. 55	7
Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294	12
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367	11, 12
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572	12
Touche Ross & Co. v. *Redington*, 442 U.S. 560	7
United States v. *Rutherford*, 442 U.S. 544	12
Zenith Radio Corp. v. *United States*, 437 U.S. 443	11

Statutes and regulations: Page

Back Pay Act, 5 U.S.C. 5596 5

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. III) 1101 *et seq.* 3

Classification Act of 1949, ch. 782, Pub. L. No. 429, 63 Stat. 954, 5 U.S.C. (1952 ed.) 1071 *et seq.*:
Section 202(7), 5 U.S.C. (1952 ed.) 1082(7) 10
Section 802(b), 5 U.S.C. (1952 ed.) 1132(b) 10

Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 2

Tucker Act:
28 U.S.C. 1346(a) 16
28 U.S.C. 1491 5

Pub. L. No. 87-793, Section 604(a), 76 Stat. 847, 5 U.S.C. (1964 ed.) 1132(b) 12, 13

Pub. L. No. 92-392, 86 Stat. 564 14
5 U.S.C. 5341 *et seq.* 1, 3, 14
5 U.S.C. 5342(a) (2)(A) 2
5 U.S.C. (& Supp. III) 5343 3
5 U.S.C. 5343(c) (5) 9, 14

5 U.S.C. 5102(a) (5) 2, 8-9, 17a

5 U.S.C. 5102(b) 2

5 U.S.C. 5102(c) 15

5 U.S.C. 5102(c) (7) 2, 17a

5 U.S.C. 5104 2

5 U.S.C. 5106(b) 2

5 U.S.C. (& Supp. III) 5331 *et seq.*: 1, 2, 18a
5 U.S.C. 5331(a) 8-9, 18a
5 U.S.C. (& Supp. III) 5332 2
5 U.S.C. (& Supp. III) 5334(a) 7, 8, 14
5 U.S.C. (Supp. III) 5334(b) ..... passim, 19a
5 U.S.C. 5338 8

Statutes and regulations—Continued: Page

31 U.S.C. 71 11
31 U.S.C. 71a 15
31 U.S.C. 72 11
5 C.F.R. 25.103(b), 15 Fed. Reg. 1235 (1950) .. 10
5 C.F.R. 25.104(a), 15 Fed. Reg. 1236 (1950) .. 10
5 C.F.R. 25.104(a), 15 Fed. Reg. 7868 (1950) .. 10
5 C.F.R. 25.104(a), 25 Fed. Reg. 7147 (1960) 10-11
5 C.F.R. 531.202(h) (2) 9, 19a-20a
5 C.F.R. 531.203(c) 3, 4, 8, 20a
5 C.F.R. 531.204(a), 33 Fed. Reg. 12450 (1968) 11
5 C.F.R 531.204(a) (1), 28 Fed. Reg. 10948 (1963) 11
5 C.F.R. 531.204(a) (1) 6, 20a

Miscellaneous:

Civilian Manpower Management Instruction 531.S2 (June 26, 1974) 4
52 Comp. Gen. 695 (1973) 11
59 Comp. Gen. 209 (1980) 11
Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975) (unpublished) 11
Comp. Gen. opinion B-172706.4 (Apr. 19, 1972) (unpublished) 11
Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1:
Subchapter S8-2a (7) (Apr. 14, 1980) 9, 20a-21a
Subchapter S8-3c (Inst. 17 Apr. 14, 1980) 9, 21a
Subchapter S8-3d (Inst. 8 Jan. 16, 1973) 4, 9, 21a-22a
Subchapter S8-3d (Inst. 17 Apr. 14, 1980) 4

Miscellaneous—Continued: Page

C. Goodman, *Handbook on Public Personnel Law* (1978) 2

Hearings on Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted Before the House Comm. on Post Office & Civil Service, 87th Cong., 1st Sess. (1961) 12-13

H.R. 1010, 87th Cong., 1st Sess. (1961) 13

H.R. 2015, 87th Cong., 1st Sess. (1961) 13

H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. (1962) 13

H.R. Rep. No. 92-339, 92d Cong., 1st Sess. (1971) 14

S. Rep. No. 92-791, 92d Cong., 2d Sess. (1972) 14

S. Rep. No. 2120, 87th Cong., 2d Sess. (1962) 13

U.S. Bureau of the Census, *Statistical Abstract of the United States: 1979* 2

R. Vaughn, *Principles of Civil Service Law* (1976) 2, 3

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims on the issue of liability (App. A, *infra*, 1a-8a) is reported at 599 F.2d 411. The order of the Court of Claims determining the amount of respondents' recovery (App. B, *infra*, 9a-14a) is unreported.

JURISDICTION

The opinion of the Court of Claims on the issue of liability was rendered on May 16, 1979. A timely petition for rehearing was denied on September 28, 1979 (App. C, *infra*, 15a-16a). The judgment of the Court of Claims awarding monetary recovery to respondents was entered on August 8, 1980 (App. B, *infra*, 9a). On October 28, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255. See *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

STATUTES AND REGULATIONS ~~PROVISIONS~~ INVOLVED

The pertinent statutory and regulatory provisions are set forth in Appendix D, *infra*, 17a-22a.

STATEMENT

1. This case involves two of the principal pay systems for federal employees—the General Schedule (GS), 5 U.S.C. (& Supp. III) 5331 *et seq.*, and the prevailing-rate Wage System (WS), 5 U.S.C. (& Supp. III) 5341 *et seq.*

Except as otherwise provided, "all civilian positions and employees in or under an agency" fall within the General Schedule. 5 U.S.C. 5102(b); see also 5 U.S.C. 5331. The General Schedule covers most federal white-collar positions. See R. Vaughn, *Principles of Civil Service Law* § 6.2(a), at 6–4 (1976). There are approximately 1.4 million full-time employees in the General Schedule. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1979*, at 279, Table No. 466 (1979) ("1979 Statistical Abstract").

The General Schedule comprises 18 grades. See 5 U.S.C. 5104, 5332. A grade

> includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—
>
> (A) level of difficulty and responsibility; and
>
> (B) level of qualification requirements of the work; to warrant their inclusion within one range of rates of basic pay in the General Schedule.

5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5106(b). In turn, each grade is divided into rates of pay, or steps. See 5 U.S.C. 5332. GS salaries are determined pursuant to the principles of comparability set forth in the Federal Pay Comparability Act of 1970. See 5 U.S.C. 5301. The salary level for a given GS grade and step is uniform nationwide. See 5 U.S.C. 5332.

In contrast to the General Schedule, the Wage System is applicable to federal blue-collar workers. See 5 U.S.C. 5342(a)(2)(A); C. Goodman, *Handbook on Public Personnel Law* 147 (1978); Vaughn, *supra*, § 6.2(b), at 6–17. By definition, WS positions are excluded from the General Schedule. See 5 U.S.C. 5102(c) (7), 5331, 5342(1)(2)(A). The wage System encompasses approximately 462,000 full-time employees. See 1979 Statistical Abstract, *supra*, at 279, Table No.

466. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the local wage area. See 5 U.S.C. 5341, 5343. Thus, unlike the General Schedule, WS rates are determined for each locality and vary across the country.[1]

2. Respondents are six present and former employees of the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy. Between July 1973 and October 1974, they were promoted from positions in the prevailing-rate Wage System to positions under the General Schedule.

Incident to these changes in position, respondents' salaries were calculated pursuant to the provisions of the General Schedule. However, two inconsistent methodologies were used in making those calculations. With respect to respondent Libretto, the Civil Service Commission (CSC) "highest previous rate" rule was applied. That rule provides that

> when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate.

5 C.F.R. 531.203(c) (App. D, *infra*, 20a).[2] Respondent Libretto's highest previous rate fell between two steps of his new GS grade and, in accordance with general

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[1] The history of the Wage System is discussed in Vaughn, *supra*, § 6.2(b), at 6-18 to 6-20.

[2] In 1978, the Civil Service Commission was succeeded by the Office of Personnel Management (OPM). See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S. (Supp. III) 1101 *et seq.*

Navy policy,[3] he was given the higher salary level. In this way, respondent Libretto received a salary increase upon his appointment to the General Schedule.

The GS salaries of the other respondents were determined by first applying the provision of Subchapter S8-3d of the CSC Federal Personnel Manual System (FPM), *Federal Wage System*, Supplement 532-1 (Inst. 8, Jan. 16, 1973) (App. D, *infra*, 21a-22a), which stated that an employee promoted to a Wage System position is entitled to be paid at the lowest scheduled rate that exceeds his existing rate of pay by no less than a one-step increment of the category from which he was promoted.[4] Once this adjustment had been made, the new GS salaries of these respondents were computed by applying the "highest previous rate" rule of 5 C.F.R. 531.203(c) to the adjusted rates of pay. Thus, each of these respondents was awarded two salary increases for a single promotion. This method of computation was in error, because Subchapter S8-3d and the "highest previous rate" rule of 5 C.F.R. 531.203(c) are not applicable to the same personnel action; Subchapter S8-3d covers promotions to a WS position, while the "highest previous rate" rule pertains to promotions from a WS position to a GS position.

In November 1974, respondent Libretto filed an appeal with the Navy, claiming that he was entitled to

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[3] By regulation, the Navy has elected to place employees at the higher of the two GS rates in all cases where it serves the interest of the government. See Civilian Manpower Management Instruction 531.S2 (June 26, 1974).

[4] This section was recently amended to provide for an increase of 4% of the representative rate of the previous grade instead of a one-step increase. See Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-3d (Inst. 17, Apr. 14, 1980). This amendment does not affect the question presented herein.

the higher GS salary received by the other respondents. The Navy rejected this contention on the ground that respondent Libretto's GS salary had been properly determined. The Navy also concluded that the salaries of the other respondents were erroneous, and accordingly it notified them that their salaries would be reduced to the correct levels based on the formula utilized in the case of respondent Libretto (App. A, *infra*, 2a).

Respondents unsuccessfully pursued their administrative remedies, and on January 29, 1976, they commenced this suit in the Court of Claims under the Tucker Act (28 U.S.C. 1491) and the Back Pay Act (5 U.S.C. 5596). Respondents contended that they were entitled to a two-step increase pursuant to 5 U.S.C. 5334(b), which reads in pertinent part (App. D, *infra*, 19a):

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Respondents sought an award of back pay and a correction of their employment records in accordance with Section 5334(b).[5]

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[5]On its face, 5 U.S.C. 5334(b) entitles the employee to a GS salary that "exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Thus, the Court of Claims clearly misunderstood the operation of Section 5334(b) when it stated (App. A, *infra*, 1a n.1) that the statutory increase was measured by two steps of the new grade to which the employee was promoted rather than of the former grade from which he was promoted.

On cross-motions for summary judgment, the Court of Claims held (App. A, *infra*, 1a-8a) that respondents were entitled to a two-step salary increase under 5 U.S.C. 5334(b). Focusing on the word "promoted," the court found that Section 5334(b) is applicable to promotions from the Wage System to the General Schedule. In addition, relying on the fact that a promotion within the GS system gives rise to a two-step increase, and believing that "[a]n employee promoted within the WS receives a comparable benefit; even an employee promoted 'criss-cross' from GS to WS receives the benefit" (App. A, *infra*, 7a), the court concluded that Congress intended a like rule to apply to promotions from the Wage System to the General Schedule (*id.* at 8a). Accordingly, the court invalidated, as inconsistent with the statute, the OPM regulation that construed Section 5334(b) to be limited to transfers or promotions *within* the General Schedule:

> The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

5 C.F.R. 531.204(a)(1) (App. D, *infra*, 20a).

Based on this decision, the case was remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. The government's motion for rehearing on the issue of liability was denied (App. C, *infra*, 15a-16a). Thereafter, the parties stipulated to the amount of respondents' recovery, and final judgment was entered on August 8, 1980 (App. B, *infra*, 9a-14a).

REASONS FOR GRANTING THE PETITION

The Court of Claims has held in this case that 5 U.S.C. 5334(b) requires a two-step salary increase for all employees promoted from the prevailing-rate Wage System to the General Schedule. In so holding, the court ignored the plain language of the statute and disregarded the contrary interpretation that the agencies charged with administering Section 5334(b) have consistently followed since the time of enactment. Because the Court of Claims' ruling on this important issue involving the pay of federal employees threatens to impose substantial monetary liability on the United States without congressional authorization, review by this Court is warranted. In light of the manifest error of the decision below, the Court may wish to consider summary reversal of the judgment of the Court of Claims.

1. This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 5. See also, *e.g.*, *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

Here, the language of the statute clearly indicates that a two-step salary increase is not required for promotions from the Wage System to the General Schedule. By its terms, 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission]

in conformity with this subchapter and chapter 51 of this title * * *" (App. D, *infra*, 18a).[6] Pursuant to this authority and 5 U.S.C. 5338, the Civil Service Commission promulgated the "highest previous rate" rule, 5 C.F.R. 531.203(c), to determine the new rate of pay "when an employee is reemployed, transferred, reassigned, promoted, or demoted" in the General Schedule (App. D, *infra*, 20a). Under this provision, the Navy was authorized to pay each respondent "any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate" (*ibid.*). Thus, the General Schedule salary of each respondent was properly computed to be the higher of the two GS rates between which his highest previous rate fell.[7]

Contrary to the analysis of the Court of Claims, 5 U.S.C. 5334(b) does not compel a different result. Section 5334(b) provides (App. D, *infra*, 19a) that "[a]n employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Under 5 U.S.C. 5102(a)(5) and 5 U.S.C. 5331(a), the word "grade" is defined to include (App. D, *infra*, 17a) "all classes of positions which * * * are sufficiently equivalent * * * to warrant their inclusion within one range of rates of basic pay *in the*

[6] The Court of Claims agreed (App. A, *infra*, 3a n.4) that 5 U.S.C. 5334(a) is applicable to respondents' promotion from the Wage System to the General Schedule.

[7] Respondents have never challenged the particular calculations made under the "highest previous rate" rule, but rather have contended only that the rule is not applicable in this case at all.

General Schedule" (emphasis added). Accordingly, Section 5334(b) is expressly confined to promotions from one GS position or grade to another, and thus it is inapplicable to promotions, as in the present case, from the Wage System to the General Schedule.[8]

Indeed, this has been the longstanding and consistent interpretation of the statute by the agencies re-

[8]This conclusion is not altered, as the Court of Claims believed (App. A, *infra*, 5a–8a), by the fact that respondents may be said to have been "promoted" from a WS position to a GS position. In pertinent part, a "promotion" is defined to be "a change of an employee, while continuously employed, from * * * [a] lower rate paid under * * * [a non-GS system] to a higher rate within a General Schedule grade." 5 C.F.R. 531.202(h)(2) (App. D, *infra*, 19a–20a). Thus, respondents received a promotion only because application of the "highest previous rate" rule resulted in an increase in their basic rate of pay. However, for purposes of 5 U.S.C. 5334(b), the salient inquiry is not whether an employee received a promotion but whether the promotion occurred within the General Schedule.

In addition, the Court of Claims erred in stating (App. A, *infra*, 7a & n.13) that the government conceded that an employee promoted within the Wage System or from the General Schedule to the Wage System is entitled to an increase "comparable" to the two-step increase provided by Section 5334(b) for an employee promoted within the General Schedule. As the government explained in its cross-motion for summary judgment (page 11) and in its petition for rehearing en banc (pages 4–5), an employee promoted either within the Wage System or from the General Schedule to the Wage System receives a one-step increase pursuant to Subchapter S8-2a(7) and S8-3d of FPM Supplement 532–1 (App. D, *infra*, 20a–22a; see also page 4 note 4, *supra*); an employee who is transferred or reassigned but not promoted within the meaning of Subchapter S8-2a(7) may receive an increase only in accordance with the "highest previous rate" rule of Subchapter S8-3c (App. D, *infra*, 21a). Moreover, these increases are not required by statute, but instead have been established by OPM in the exercise of its discretion under 5 U.S.C. 5343(c)(5). Thus, the court's discussion in this regard reflects a fundamental misunderstanding of the Wage System.

sponsible for its administration. The provision for an automatic salary increase now found in 5 U.S.C. 5334(b) was originally enacted in the Classification Act of 1949, ch. 782, Pub. L. No. 429, Section 802(b), 63 Stat. 969-970, 5 U.S.C. (1952 ed.) 1132(b).[9] In first implementing the Act, the Civil Service Commission promulgated regulations providing that "[a]n employee promoted, repromoted or transferred to a higher grade *between Classification Act positions*, shall receive * * * [the automatic salary increase]." 5 C.F.R. 25.104(a), 15 Fed. Reg. 1236 (1950) (emphasis added). Unless the promotion or transfer occurred within the Classification Act system, it was subject to the "highest previous rate" rule applicable to "an employee who is reemployed, transferred, reassigned, promoted, repromoted, or demoted * * *" from a different pay system to a position under the Classification Act. See 5 C.F.R. 25.103(b), 15 Fed. Reg. 1235 (1950). Since prevailing-rate positions were excluded from the Classification Act (see ch. 782, Pub. L. No. 429, Section 202(7), 63 Stat. 954-955, 5 U.S.C. (1952 ed.) 1082(7)), an employee transferred or promoted from such a position to a Classification Act position was covered by the "highest previous rate" rule and was not entitled to an automatic step increase in salary.

Subsequent revisions to the regulations have consistently adhered to the construction that the step-increase provision is inapplicable to transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position.[10] Likewise, the

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[9] This section initially provided for a one-step salary increase, but it was amended in 1962 to specify a two-step increase. See page 12, *infra*.

[10] See, *e.g.*, 5 C.F.R. 25.104(a), 15 Fed. Reg. 7868 (1950) ("[a]n employee promoted, repromoted or transferred to a higher grade between Classification Act positions or grades");

General Accounting Office, which is authorized to settle and adjust "[a]ll claims and demands whatever * * * against [the Government of the United States]" (31 U.S.C. 71; see also 31 U.S.C. 72), has uniformly recognized that the "highest previous rate" rule, rather than the automatic step-increase provision, governs transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position. See, *e.g.*, 59 Comp. Gen. 209 (1980); 52 Comp. Gen. 695 (1973); unpublished Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975); unpublished Comp. Gen. opinion B-172706 (Apr. 19, 1972).

In disregarding these administrative authorities, the Court of Claims plainly erred by failing to heed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). This principle is particularly apt where, as here, there is a "longstanding and consistent administrative interpretation" (*Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) that "involves a contemporaneous construction of [the] statute by the [persons] charged with the

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5 C.F.R. 25.104(a), 25 Fed. Reg. 7147 (1960) ("[t]he requirements of Section 802(b) of the [Classification] Act apply in repromotion actions and in transfers involving promotions between Classification Act grades"); 5 C.F.R. 531.204(a)(1), 28 Fed. Reg. 10948 (1963) ("[t]he requirements of Section 802(b) of the [A]ct * * * apply in a transfer involving a promotion between Classification Act grades"); 5 C.F.R. 531.204(a), 33 Fed. Reg. 12450 (1968) ("[t]he requirements of Section 5334(b) of title 5, United States Code, apply only (1) to a transfer from one General Schedule position to a higher General Schedule position, and (2) to a promotion from one General Schedule grade to a higher General Schedule grade").

responsibility of setting its machinery in motion" (*Andrus* v. *Shell Oil Co.*, No. 78-1815 (June 2, 1980), slip op. 10, quoting *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933)).

Moreover, judicial deference to the agency's interpretation of a statute is especially appropriate "when Congress has refused to alter the administrative construction." *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), quoting *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381. "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). And, in examining the statute and its administrative construction, "the views of subsequent Congresses * * * are entitled to significant weight." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980).

As originally enacted, the Classification Act required a one-step salary increase for promoted employees (see page 10 and note 9, *supra*). In 1962, the statute was amended to provide for a two-step increase. See Pub. L. No. 87-793, Section 604(a), 76 Stat. 847-848, 5 U.S.C. (1964 ed.) 1132(b). The congressional hearings preceding this legislation clearly evince the understanding that the automatic step increase was not applicable to employees promoted from a prevailing-rate position to the General Schedule. Thus, as Chairman Dulski stated in opening the hearings, "[t]hese bills would provide a formula for guaranteeing employees *under the Classification Act* a minimum salary increase when promoted *from one*

grade to another. The purpose of this legislation is to require that, when *a classified employee is promoted*, he will receive an increase in compensation that is more realistic and more commensurate with the increased responsibilities he must assume in the higher grade." *Hearings on Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted Before The House Comm. on Post Office and Civil Service*, 87th Cong., 1st Sess. 2 (1961) (emphasis added).[11] Representative Lesinski, the sponsor of one of the bills, explained that "[u]nder present law, *a classified employee who is promoted or transferred to a higher grade*, in most cases, receives a pay increase equal to at least a one-step increase in the grade from which promoted. * * * The simple objective of [the bill] is to make more realistic and more meaningful *promotions from one grade to a higher grade for employees under the Classification Act*" (*id.* at 3; emphasis added). Similarly, O. Glenn Stahl, testifying on behalf of the Civil Service Commission, emphasized that "[w]e are speaking now only of employees whose positions are subject to the Classification Act. * * * [The bill is] limited to the Classification Act. It has no applicability to jobs not under the Classification Act" (*id.* at 6, 10). In a later discussion, Mr. Stahl again stated that employees excluded from the Classification Act would not benefit from the bill (*id.* at 16, 17), reiterating that "[i]t is only applicable to employees under the Classification Act" (*id.* at 18).

[11] The bills under consideration at the hearings—H.R. 1010, 87th Cong., 1st Sess. (1961), and H.R. 2015, 87th Cong., 1st Sess. (1961)—were indistinguishable in terms of coverage from the provision enacted into law as Section 604(a). See H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962); S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962). However, while H.R. 1010, like Section 604(a), called for a two-step increase, H.R. 2015 required that the salary be increased by the difference between the minimum rates of the new grade and the former grade.

In 1972, Congress again considered the pay systems for federal employees when it enacted Pub. L. No. 92-392, 86 Stat. 564, 5 U.S.C. 5341 *et seq.* The purpose of this legislation was to codify and standardize the prevailing-rate system, which had theretofore been governed largely by administrative regulation and practice. See S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971). Comparable to the authority granted by 5 U.S.C. 5334(a) with respect to the General Schedule, the statute authorized the Civil Service Commission to prescribe regulations under the Wage System "governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status." 5 U.S.C. 5343(c)(5). In adopting this provision, Congress "intended to grant to the Commission the same authority which it now has under 5 United States Code 5334 with respect to employees paid under the General Schedule" (H.R. Rep. No. 92-339, *supra*, at 14). In particular, it was contemplated that "[t]he Commission's regulations [for the Wage System] may cover matters such as * * * application of the highest previous rate rule * * *" (*ibid.*). Thus, Congress expressly approved the "highest previous rate" rule, which the Commission had consistently used for more than 20 years to determine the salary level of an employee transferred or promoted from a prevailing-rate position to a GS position. This specific congressional endorsement of the Commission's practice is completely at odds with the Court of Claims' conclusion that the provision for an automatic two-step increase, rather than the "highest previous rate" rule, was applicable to respondents' promotions from the Wage System to the General Schedule.

In sum, the Court of Claims' construction of 5 U.S.C. 5334(b) is contrary to the unambiguous lan-

guage of the statute, the longstanding and consistent administrative interpretation, and the understanding of Congress.

2. The Court of Claims' decision, if allowed to stand, will impose substantial monetary liability on the United States. Based on the decision below, the General Accounting Office has already received approximately 4300 claims that are conservatively estimated to involve $22 million in back pay.[12] Most of these claims have been submitted by employees of the Navy, the agency involved in this litigation, and GAO expects that more than 10,000 claims will be made once the Court of Claims' decision is fully publicized. Moreover, potential claimants are not limited to employees who were promoted from the Wage System to the General Schedule within the six-year limitations period provided by 31 U.S.C. 71a, but also include employees whose salary during that time was affected by a promotion that occurred more than six years before the claim was filed. And, with respect to all timely claims, the government's liability would extend beyond salary awards to various other items that are based on an employee's rate of pay, such as overtime compensation, differentials for night work or hazardous duty, annuities and lump-sum payments for annual leave, and government contributions to life insurance and retirement funds.[13]

In addition, the decision of the Court of Claims is not confined to former Wage System employees. 5 U.S.C. 5102(c) lists 25 other categories of federal employees that are outside the General Schedule, and therefore these employees, like those in the Wage Sys-

---

[12] The recovery of the six respondents in this case exceeded $36,600.

[13] Indeed, almost 20% of respondents' total recovery in this case consisted of non-salary elements.

tem, have not previously been given the automatic step increase of 5 U.S.C. 5334(b). Under the court's reasoning, however, such employees may now claim the benefits of that provision. Furthermore, the Court of Claims stated (App. A. *infra*, 7a), albeit erroneously (see page 9 note 8, *supra*), that promotions within the Wage System and promotions from the General Schedule to the Wage System also fall within Section 5334(b).

Finally, the United States will be required to make significant continuing expenditures to comply with the Court of Claims' interpretation of 5 U.S.C. 5334(b). In light of the court's construction of that provision, the government is obligated to give an automatic two-step increase to employees who are promoted in the future. And, as the court made clear in invalidating existing OPM regulations (App. A, *infra*, 8a), this obligation rests directly on the statute and cannot be modified by administrative promulgation.[14]

Pursuant to the Tucker Act (28 U.S.C. 1346(a), 1491), all subsequent suits involving salary increases under Section 5334(b) may be brought in the Court of Claims. A conflict among the lower courts therefore is unlikely to develop. Thus, the panel decision in the instant case, which the Court of Claims declined to rehear en banc, represents controlling precedent on the

[14] Apart from the direct monetary liability imposed on the United States, the Court of Claims' decision will also result in a serious administrative burden for the government to process the thousands of claims involved. This burden will be particularly onerous with respect to promotions occurring many years ago that had an effect on payments to employees within the six-year limitations period; in these cases, old (and often inactive) records must be located or, if no longer in existence, reconstructed, and the necessary computations carried forward over several years in accordance with intervening changes in the personnel systems.

issue in the absence of this Court's intervention. Given the manifest error of the ruling below and the substantial and continuing monetary liability imposed on the United States, the decision of the Court of Claims should not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the Court of Claims.

Respectfully submitted.

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Solicitor General

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JANUARY 1981

APPENDIX A

In the United States Court of Claims

No. 26-76

(Decided May 16, 1979)

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

Before KUNZIG, BENNETT, AND SMITH, *Judges*.

ON CROSS MOTIONS FOR SUMMARY JUDGMENT

KUNZIG, *Judge*, delivered the opinion of the court:

This civilian pay case of first impression involves the proper salary rate for a person promoted from a Wage System (WS) classification position to a General Schedule (GS) position. Plaintiffs claim they are entitled to a salary rate set at an amount equal to two step-increases.[1] The Government argues that this two

[1] The mechanics of the two step-increase is as follows: If the employee's rate in his old position was equal to a rate in the new position, he would be paid at the rate two steps above the step which was equal to his old rate.

If the employee's rate in his old position fell between two rates in the new position, he would be paid at the rate two steps above the *higher* of the rates that his old rate fell between.

Thus an employee receives a minimum of two steps, but it may be more if his old rate fell between two new rates.

step-increase does not apply to promotions from a WS position to a GS position. We agree with plaintiffs.

The six plaintiffs in this case are or were employed on the staff of the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy. Between July 1973 and October 1974, all were promoted from various positions under the prevailing rate system (or WS) to positions covered under the GS. Plaintiff LiBretto was employed as a Ship Surveyor, Grade 8, level 4 of the WS, earning $7.92 per hour or $16,473.60 per year. His old salary fell between step 4 ($16,138) and step 5 ($16,627) of the GS-11 scale to which he had been promoted. His salary was set at a GS-11, step 5, the higher of the two rates.

The other five plaintiffs had also been promoted[2] from Ship Surveyor to GS positions. However, they had received the benefits of two step-increases at the time of their respective promotions.

LiBretto, believing he was entitled to a GS-11, step 7 (instead of a GS-11, step 5) filed a complaint. That complaint touched off a Navy investigation into the method of calculating LiBretto's salary and the salaries of others who had been promoted in a similar manner. The Navy determined that it had correctly calculated LiBretto's salary and incorrectly calculated the salaries of the other five plaintiffs. The five then received a salary step downgrading in April 1975. However, any possible withholdings to recoup the alleged overpayments have been deferred pending a request by plaintiffs for a waiver. Plaintiffs' six-man Group Grievance was unsuccessful, and they now have

[2] All six plaintiffs were promoted following application, selection, and appointment under the Department of the Navy Merit Promotion Program.

filed a petition in this court. Defendant counterclaimed for the alleged overpayments.[3]

We hold for plaintiffs.

This case turns on the meaning of 5 U.S.C. § 5334[4] and various regulations contained in 5 C.F.R. Part 531.

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[3] Defendant's counterclaim has been dismissed on its own motion, which was made after oral argument.

[4] Section 5334(a) states in pertinent part:

> (a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission in conformity with this subchapter and chapter 51 of this title when—
>
> (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
>
> (2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;
>
> (3) he is demoted to a position in a lower grade;
>
> (4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;
>
> (5) his type of appointment is changed;
>
> (6) his employment status is otherwise changed; or
>
> (7) his position is changed from one grade to another grade.

The Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111, substituted the "Office of Personnel Management" for "Civil Service Commission."

Although the word "promotion" does not expressly appear in 5334(a), it seems clear that it falls within one of the seven categories, as the legislative history of an earlier version of this subsection referred to promotion. *See* H.R. Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. Code Cong. Ser. 2363, 2374-75.

Section 5334(b) states in pertinent part:

> (b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. . . .

Plaintiffs therefore argue that since it is undisputed that they did receive "promotions,"[5] they are entitled to a two step-increase under section 5334(b).

However, the Government points to 5 C.F.R. § 531.204(a),[6] a regulation which purports to limit the above statute (§ 5334(b)) to promotions within the GS. The Government further argues that plaintiffs' salary rate is governed by 5 C.F.R. § 531.203(c), which states that:

> . . . when an employee is reemployed, transferred, reassigned, promoted, or demoted, the

---

[5] Both plaintiffs and defendant have termed these actions promotions. Furthermore, 5 C.F.R. § 531.202(h) states:

> (h) "Promotion" means a change of an employee, while continuously employed, from:
>
> (1) One General Schedule grade to a higher General Schedule grade; or
>
> (2) A lower rate paid under authority other than subchapter III of chapter 53 of title 5, United States Code, to a higher rate within a General Schedule grade.

Clearly, plaintiffs were promoted under the definition of 5 C.F.R. § 531.202(h)(2).

[6] 5 C.F.R. § 531.204(a)(1) reads:

> (1) The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

> agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. . . .

We are, therefore, confronted with:

(1) a *statute* that says "promotions" entitle the employee to two step-increases (5 U.S.C. § 5334(b));

(2) a regulation that puts plaintiffs' situation within the definition of "promotion" (5 C.F.R. § 531.202 (h)(2));

(3) another regulation that says that statutory entitlement of a "promotion" does not apply to plaintiffs' situation (5 C.F.R. § 531.204(a)); and

(4) a regulation that says an agency can pay a "promoted" employee at his existing rate, or, if he falls between two rates, at the higher rate (i.e., no step-increases) (5 C.F.R. § 531.203(c)). The three regulations, apparently contradictory among themselves and with the statute, appear on three consecutive pages in C.F.R. and are all within Part 531, Subpart B of 5 C.F.R.[7]

The Government attempts to argue that, at least to these plaintiffs, the regulations do not conflict.

The old rates of all six plaintiffs fell between two GS-11 steps, and they received the higher of the two rates.[8] Thus, all the plaintiffs *in this case* received

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[7] Just how incredibly confusing the regulations were is certainly obvious since the Government paid five claimants, then changed its mind, then refused to pay another, reneged on the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim.

[8] Some plaintiffs had been promoted further prior to the April 1975 salary downgrading, and their current rate was therefore adjusted.

some increase in compensation due to their promotions.

However, this theory of the Government's does not explain why the statutory entitlement to two step-increases for a "promotion" does not apply to plaintiffs since they have received a "promotion" under the definition used by both plaintiffs and defendant. (*See* note 5, *supra.*)

The concept of step-increases for promotions had its origins in section 802 of the Classification Act of 1949, ch. 782, 63 Stat. 954, 969. Section 802(a) of that Act is almost identical to the current 5334(a) (*see* note 4, *supra*). Section 802(b) contains language virtually the same as the present 5334(b), except that the earlier statute only provided for one step-increase.[9] Although this 1949 statute is no clearer than its current version, the House Report[10] leaves little doubt as to what Congress intended:

> Subsection (b) of section 802 provides that any officer or employee who is promoted or transferred to a position in a higher class or grade shall receive basic compensation at the lowest rate of the higher class or grade which is at least one step increase above his existing rate of basic compensation.
>
> * * * * *
>
> At present, a promoted employee receives no immediate increase if he is already receiving a

---

[9]The second step-increase for promotions was added by the Act of October 11, 1962, Pub.L. No. 87-793, 76 Stat. 832, 847-48.

[10]The House Bill was passed in lieu of the Senate Bill, and the Conference Report did not mention section 802. *See* H.Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. Code Cong. Ser. 2363, 2375.

rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates.

In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities.

Subsection (b) of section 802 corrects this situation.[11] (emphasis added).

Congress thus intended that a promotion mean additional compensation of at least a certain amount (in 1949 one step; now two steps (*see* note 9, *supra*)). Applying 5 C.F.R. § 531.203(c), as the Government urges, would, in some instances, leave a promoted employee with no additional pay. The Government argues that that is not this case. However, neither plaintiffs, nor a hypothetical employee with no increase at all, would receive under the Government's theory the kind of increase in pay that section 5334(b) requires.

Section 5334(a) authorizes the preparation of "a comprehensive, unified set of rules."[12] An employee promoted within the GS receives the benefit of two step-increases. An employee promoted within the WS receives a comparable benefit; even an employee promoted "criss-cross" from GS to WS receives the benefit.[13] *See* FPM Supplement 532-1, Subchapter S 8,

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[11] *Id.*

[12] *See id.* (purpose of parent subsection in 1949 Act).

[13] The Government concedes this point.

§ 8-3(d); § 8-2(a)(7). But, surprisingly, promotions from WS to GS (the other criss-cross), the Government argues, give the employee no such benefit. We do not agree, however, that Congress meant promotions to include only certain kinds of promotions,[14] nor has defendant cited any statute or case mandating such a mixed result.

Therefore, we hold that 5 U.S.C. § 5334(b) requires that a GS employee who has been promoted from the WS is entitled to two step-increases.[15] Because the regulations (5 C.F.R. § 531.204(a) and 5 C.F.R. § 531.203 (c)) as they pertain to promotions are inconsistent with the statute, they cannot, to that extent, stand. *See Hart* v. *United States*, 218 Ct.Cl. ___, 585 F.2d 1025 (1978); *Farrell Lines, Inc.*, v. *United States*, 204 Ct. Cl. 482, 499 F.2d 587 (1974).

Accordingly, after careful consideration of all the parties' submissions, and oral argument, we grant plaintiffs' motion for summary judgment. Defendant's motion for summary judgment is denied. The case is remanded to our Trial Division for proceedings in accordance with Rule 131(c)(2).

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[14] *See Allstate Insurance Co.* v. *United States*, 213 Ct.Cl. 96, 550 F.2d 629 (1977) (absent an indication to contrary, court assumes Congress intended to convey ordinary meaning of the language it used).

[15] It could be argued that the language in § 5334(b) which refers to pay exceeding by two step-increases the "grade from which he is promoted" implies that the employee must have been at a GS grade to be promoted from. However, the House Report of the 1949 Act, *supra* (an Act which had the same language), used the phrase "above his existing rate of basic compensation." *Id.* This negates any suggestion that Congress may have subtly limited this provision to promotions within the GS.

APPENDIX B

In the United States Court of Claims

No. 26-76

FILED AUG 8 1980

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

ORDER

On May 16, 1979, the court rendered an opinion holding that the plaintiffs were entitled to recover and entering judgment to that effect. The determination of the amount of recovery was reserved pending further proceedings pursuant to Rule 131(c).

On August 5, 1980, the trial judge of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of the parties, judgments be entered for the plaintiffs as provided on the attached sheet.

IT IS THEREFORE ORDERED that judgments be and the same are entered for the plaintiffs whose names appear on the attached sheet in the amounts listed and as computed therein.

BY THE COURT

/s/ _____

PHILIP NICHOLS, JR.
Acting Chief Judge

ATTACHMENT TO MEMORANDUM REPORT FOR JUDGEMENT FILED AUGUST 5, 1980

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1. The back salary entitlement for plaintiff, Joseph J. Clark, covers the period August 18, 1974 to and including October 7, 1978, when plaintiff Clark retired. During this period, his gross additional back pay entitlement was $4,112.00. Such amount includes a lump sum leave payment. Such gross additional back pay entitlement is subject to Civil Service Retirement deduction of $287.94, and Federal Employees Group Life Insurance (FEGLI) premiums of $38.70. The United States Government is responsible for contributions on behalf of plaintiff of $287.94 to the Civil Service Retirement Fund, and $19.35 for FEGLI premiums. In addition, plaintiff Clark is entitled to additional retirement annuity payments in the amount of $584.00 for the period through August 30, 1979, and $340.00 as additional survivor annuity through May 30, 1980. Since the date of the court's decision in this case, plaintiff, Joseph J. Clark, died. Accordingly, a motion for substitution, under Rule 66, of his surviving widow, Mrs. Margaret Devine Clark, was filed and allowed by the court. It is stipulated and agreed that plaintiff's entitlement and any additional service benefits for plaintiff, Joseph J. Clark, shall be paid to Mrs. Margaret Devine Clark. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Joseph J. Clark, and against defendant, in the total amount of $5,036.00, with the provision that the sum of $287.94 be paid from said judgment to plaintiff's Civil Service Retirement fund, and the sum of $38.70 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is

to be made to Mrs. Margaret Devine Clark, surviving widow of plaintiff, Joseph J. Clark, in the amount of $4,709.36 for back salary to October 7, 1978, retirement entitlement through August 30, 1979, and additional survivor annuity through May 30, 1980.

2. The gross salary differential for plaintiff, Frank D'Aversa, for the period of his employment from May 26, 1974 to May 17, 1980 is $8,900.80, with an allocation of $622.77 to the Civil Service Retirement fund, and $70.63 to Federal Employees Group Life Insurance premiums. The United States Government is responsible for contribution on behalf of plaintiff of $622.77 to the Civil Service Retirement fund, and $35.32 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Frank D'Aversa, and against defendant, in the total amount of $8,900.80, with the provision that the sum of $622.77 be paid from said judgment to plaintiff's Civil Service Retirement fund account, and the sum of $70.63 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is to be made to plaintiff, Frank D'Aversa, in the amount of $8,207.40 for back salary entitlement to May 17, 1980.

3. The gross salary differential for plaintiff, Nicholas J. Libretto, for the period of his employment from October 12, 1974 to May 17, 1980, is $8,249.60, with an allocation of $577.64 to plaintiff's Civil Service Retirement fund, and $84.20 to plaintiff's Federal Employees Group Life Insurance fund. In addition, plaintiff is entitled to overtime under the Fair Labor Standards Act for the period of January 1974 through May 17, 1980, in the amount of $1,139.95. The United States Government is responsible for contributions on behalf of plaintiff of $577.64 to the Civil Service Retirement fund, and $42.10 to FEGLI premiums. Judg-

ment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Nicholas J. Libretto, and against defendant, in the total amount of $9,389.55, with the provision that the sum of $577.64 be paid from said judgment to plaintiff's Civil Service Retirement fund, and the sum of $84.20 be paid to plaintiff's Federal Employees Group Life Insurance fund. A net payment is to be made to plaintiff, Nicholas J. Libretto, in the amount of $8,727.71 for back salary entitlement to May 17, 1980.

4. The gross salary differential for plaintiff, Nicholas J. Proto, for the period of his employment from July 2, 1973 to and including June 26, 1979, the date of his death, is $4,498.52, with an allocation of $309.59 to the Civil Service Retirement fund, and $37.39 to Federal Employees Group Life Insurance premiums. In addition, plaintiff Proto, or his successor, is entitled to additional survivor annuity through May 30, 1980 of $263.00. The United States Government is responsible for contributions on behalf of plaintiff of $309.59 to Civil Service Retirement fund, and $18.70 to FEGLI premiums. Since the date of the court's decision in this matter, plaintiff, J. Proto, died. Accordingly, a motion for substitution, under Rule 66, of his surviving widow, Mrs. Annette Kurtzman Proto, was filed and allowed by the court. It is stipulated and agreed that plaintiff's entitlement and any additional service benefits for plaintiff, Nicholas J. Proto, shall be paid to Mrs. Annette Kurtzman Proto. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Nicholas J. Proto, and against defendant, in the total amount of $4,761.52, with the provision that the sum of $309.59 is to be paid to plaintiff's Civil Service Retirement fund, and $37.39 is to be paid to FEGLI premiums. A net payment is to be made to plaintiff, Nicholas J. Proto,

or his successor, in the amount of $4,414.54 for back salary entitlement to June 26, 1979, and survivor annuity through May 30, 1980.

5. The gross salary differential for plaintiff, Carlo Scialpi, for the period of his employment from September 15, 1974 to and including December 30, 1977, the date of his retirement, is $1,884.40, with an allocation of $123.32 to plaintiff's Civil Service Retirement fund, and $22.64 to plaintiff's Federal Employees Group Life Insurance premiums. Such gross salary entitlement includes lump sum leave payments. In addition, plaintiff is entitled to increased retirement benefits through May 30, 1980 of $1,077.00. The United States Government is responsible for contributions on behalf of plaintiff of $123.32 to Civil Service Retirement fund, and $11.32 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Carlo Scialpi, and against defendant, in the total amount of $2,961.40, with the provision that the sum of $123.32 be paid to plaintiff's Civil Service Retirement fund, and $22.64 is to be paid to plaintiff's FEGLI fund. A net payment is to be paid to plaintiff, Carlo Scialpi, in the amount of $2,815.44 for back salary entitlement to December 30, 1977, and retirement benefits through May 30, 1980.

6. The gross salary differential for plaintiff, Albert Wolfus, for the period of his employment from November 11, 1973 to and including July 1, 1978, the date of his retirement, is $4,184.20, with an allocation of $285.68 to plaintiff's Civil Service Retirement fund, and $34.68 to plaintiff's Federal Employees Group Life Insurance premiums. In addition, plaintiff is entitled to increased retirement benefits through May 30, 1980 in the amount of $1,400,000. The United States Government is responsible for contributions on behalf of plaintiff of $285.68 to Civil Service Retirement fund,

and $17.34 to FEGLI premiums. Judgment may therefore be entered pursuant to the decision of May 16, 1979 in favor of plaintiff, Albert Wolfus, and against defendant, in the total amount of $5,584.20, with the provision that the sum of $285.68 be paid to plaintiff's Civil Service Retirement fund, and $34.68 is to be paid to plaintiff's FEGLI fund. A net payment is to be made to plaintiff, Albert Wolfus, in the amount of $5,263.84 for back salary entitlement to July 1, 1978, and retirement benefits through May 30, 1980

APPENDIX C

In the United States Court of Claims

No. 26-76

FILED SEP 28 1979

JOSEPH J. CLARK, ET AL.

v.

THE UNITED STATES

Before KUNZIG, *Judge*, Presiding, BENNETT and SMITH, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed June 19, 1979, for rehearing *en banc* pursuant to Rules 7(d) and 151, with reference to the decision entered herein on May 16, 1979. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied,

and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151,

IT IS ORDERED that defendant's said motion for rehearing is denied.

BY THE COURT

/s/ _____
ROBERT L. KUNZIG
Judge, Presiding

APPENDIX D

1. 5 U.S.C. 5102 provides in pertinent part:

(a) For the purpose of this chapter—

* * * * *

(5) "grade" includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—

(A) level of difficulty and responsibility; and

(B) level of qualification requirements of the work;

to warrant their inclusion within one range of rates of basic pay in the General Schedule.

* * * * *

(c) This chapter does not apply to —

* * * * *

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations, and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing whose duties are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations * * *

2. 5 U.S.C. (& Supp. III) 5331 provides:

> (a) For the purpose of this subchapter, "agency", "employee", "position", "class", and "grade" have the meanings given them by section 5102 of this title.
>
> (b) This subchapter applies to employees and positions, other than Senior Executive Service positions, to which chapter 51 of this title applies.

3. 5 U.S.C. (& Supp. III) 5334 provides in pertinent part:

> (a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management in conformity with this subchapter and chapter 51 of this title when—
>
> > (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
> >
> > (2) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter applies to another such position;
> >
> > (3) he is demoted to a position in a lower grade;
> >
> > (4) he is reinstated, reappointed, or reemployed in a position to which this subchapter applies following service in any position in the legislative, judicial, or executive branch;
> >
> > (5) his type of appointment is changed;
> >
> > (6) his employment status is otherwise changed; or
> >
> > (7) his position is changed from one grade to another grade.
>
> * * * * *

(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred. If, in the case of an employee so promoted or transferred who is receiving basic pay at a rate in excess of the maximum rate of his grade, there is no rate in the higher grade which is at least two step-increases above his existing rate of basic pay, he is entitled to—

(1) the maximum rate of the higher grade; or

(2) his existing rate of basic pay, if that rate is the higher.

If an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter on reduction in grade, he is entitled to—

(A) basic pay at a rate two steps above the rate which he would be receiving if subchapter VI of this chapter were not applicable to him; or

(B) his existing rate of basic pay, if that rate is the higher.

4. 5 C.F.R. 531.201 provides:

This subpart and sections 5333 and 5334 of title 5, United States Code, apply in fixing and adjusting rates of basic pay of each employee subject to the General Schedule.

5. 5 C.F.R. 531.202(h) provides:

"Promotion" means a change of an employee, while continuously employed, from:

(1) One General Schedule grade to a higher General Schedule grade; or

(2) A lower rate paid under authority other than subchapter III of chapter 53 of title 5, United States Code, to a higher rate within a General Schedule grade.

6. 5 C.F.R. 531.203(c) provides:

Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate. When an employee's type of appointment is changed in the same position, the agency may continue to pay the employee at his or her existing rate or may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's previous rate falls between two rates of the grade, the agency may pay him or her at the higher rate.

7. 5 C.F.R. 531.204(a)(1) provides:

The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

8. Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-2a(7) (Apr. 14, 1980), provides

Promotion means a change of an employee, while continuously employed, from:

—One grade to a higher grade under the same type wage schedule, for example, from a grade 9 under the non-supervisory wage schedule to grade 10 under the non-supervisory wage schedule, whether in the same or different wage areas.

—A job or grade under a wage schedule to a job or grade with a higher representative rate under a different wage schedule.

—A job or grade paid under the General Schedule or other statutory pay schedule to a job or grade with higher representative rate under a wage schedule.

9. Federal Personnel Manual System, *Federal Wage System*, Supplement 532-1, Subchapter S8-3c (Inst. 17 Apr. 14, 1980), provides:

Position or appointment change. Subject to S8-3d, and to pay retention provisions in subchapter S9, when an employee is reemployed, transferred, reassigned, promoted, or changed to lower grade, an agency may pay him/her at any rate of his/her grade which does not exceed his/her highest previous rate; however, if his/her highest previous rate falls between two rates of his/her grade, the agency may pay him/her at the higher rate. When an employee's type of appointment is changed in the same job, an agency may continue to pay him/her at his/her existing scheduled rate or may pay him/her at any higher rate of his/her grade which does not exceed his/her highest previous rate; however, if his/her highest previous rate falls between two rates of his/her grade, the agency may pay him/her at the higher rate.

10. At the time of the events leading to this litigation, Federal Personnel Manual System, *Federal*

Wage System, Supplement 532-1, Subchapter S8-3d (Inst. 8 Jan. 16, 1973), provided:

> **Promotion.** Upon promotion an employee is entitled to be paid at the lowest scheduled rate of the grade which exceeds his existing rate of pay by no less than one step-rate increment of the grade from which he is promoted. An employee promoted from a single rate job under a special schedule to a multistep-rate job under the regular schedule is paid at the lowest scheduled rate of the new grade which exceeds his existing rate by no less than four percent. If, for any employee so promoted, there is no rate in the higher grade which is at least one step-increase (four percent) above his existing rate of pay he shall receive (1) the maximum scheduled rate of the higher grade or (2) his existing rate of pay, if the existing rate of pay is the higher. (This rule is not applicable to actions involving changes of employees between positions paying single rates.)

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 334304 190

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER STEVAS,
CLERK

No. 80-1121

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 5, 1981

CERTIORARI GRANTED MARCH 23, 1981

TABLE OF CONTENTS

	Page
Relevant docket entries in Court of Claims	1
Petition to the United States Court of Claims (Jan. 30, 1976)	5
Defendant's answer and affirmative defense (July 14, 1976)	12
Forms 50 of Carlo Scialpi	15
Forms 50 of Albert Wolfus	19
Forms 50 of Nicholas J. Proto	23
Forms 50 of Frank D'Aversa	29
Form 50 of Nicholas J. Libretto	35
Forms 50 of Joseph Clark	37
Excerpts from Federal Wage System rate schedule	40
Memorandum from Consolidated Civilian Personnel Officer to Office of Civilian Manpower Management re pay fixing in processing promotions (Mar. 4, 1975)	42
Memorandum from Director of Civilian Manpower Management re pay fixing in processing promotion (Mar. 19, 1975)	44
Memorandum from Nicholas Libretto to Consolidated Civilian Personnel Office (Nov. 18, 1974)	47
Memorandum from Consolidated Civilian Personnel Office to Nicholas Libretto (Mar. 6, 1975)	52
Memorandum from Civilian Personnel Officer, Naval Support Activity re correction of respondents pay rates (Apr. 14, 1975)	54
Memorandum from Commanding Officer, Naval Support Activity, to Commanding Officer, Naval Supply Center, regarding corrective personnel actions (Apr. 28, 1975)	56
Memorandum from respondents to Supervisor, Shipbuilding, Conversion and Repair regarding group grievance (June 4, 1975)	58

Rejection of group grievance by Supervisor, Shipbuilding, Conversion and Repair (June 10, 1975) . 60

Memorandum from Albert Wolfus to Office of Secretary of the Navy regarding rejection of group grievance (June 11, 1975) 62

Memorandum from Supervisor, Shipbuilding, Conversion and Repair, to Secretary of the Navy regarding rejection of group grievance (June 17, 1975) 63

Denial of protest of group grievance rejection by Secretary of Navy (July 18, 1975)..... 64

Comp. Gen. Opinion B–172706.05 (KM) (Dec. 30, 1975) (unpublished) 65

Comp. Gen. Opinion B–172706 (Apr. 19, 1972) (unpublished) 67

Comp. Gen. Opinion B–191352 (Sept. 13, 1978) (unpublished) 68

Order allowing certiorari 71

RELEVANT DOCKET ENTRIES

Jan 29 1976	Filing fee of $15 paid by plaintiffs.
Feb 24 1976	Notice of reference to Trial Judge Louis Spector filed. Copy to parties.
Jul 14 1976	Defendant's answer and affirmative defense filed. Copies (5) to atty.
Dec 23 1976	Defendant's answer and affirmative defense filed. Copies (5) to atty.
May 23 1978	Plaintiffs' motion for summary judgment filed. Copies (5) to deft.
May 23 1978	Plaintiffs' motion for order granting leave to file administrative records, and waiver of production filed. Copies (2) to deft. ALLOWED JUN 8 1978.
Sep 6 1978	Defendant's cross-motion for summary judgment and defendant's response to plaintiffs' motion for summary judgment together with administrative record in one volume filed. Copies (5) to atty.
Sep 6 1978	Defendant's motion to waive reproduction of the administrative record filed. Copies (2) to atty. ALLOWED SEP 22 1978.
Oct 6 1978	Defendant's motion for leave to amend its answer and affirmative defenses filed. Copies (2) to atty. ALLOWED: NOV 2 1978.
Oct 11 1978	Plaintiffs' opposition to defendant's cross-motion for summary judgment filed. Copies (5) to deft.
Oct 26 1978	Defendant's motion for extention of time (to Nov. 15, 1978) to respond to pltf's response to cross-motion for summary judgment filed. Copies (2) to atty. ALLOWED OCT 27 1978.
Nov 2 1978	Defendant's counterclaim filed. Copies (5) to atty.
Nov 13 1978	Plaintiff's answer to defendant's counterclaim filed. Copies (5) to deft.

Nov 15 1978	Defendant's reply to plaintiffs' response to defendant's cross-motion for summary judgment filed. Copies (5) to atty.
Mar 6 1979	Argued and submitted on plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment [before, Kunzig, Bennett and Smith].
Apr 10 1979	Defendant's motion to dismiss counterclaim filed. Copies (2) to atty. ALLOWED MAY 16 1979.
May 16 1979	Plaintiffs' motion for summary judgment is granted, defendant's motion for summary judgment is denied, and the case is remanded to the Trial Division for further proceedings in accordance with Rule 131(c)(2). Opinion by Judge Kunzig. Copies to parties.
May 30 1979	Defendant's motion for extension of time (to June 19, 1979) to file motion for rehearing filed. Copies (2) to atty. ALLOWED JUN 4 1979.
Jun 5 1979	Plaintiffs' motion for call upon the General Accounting Office file Copies (2) to def. DENIED July 13, 1979, without prejudice pending disposition of the defendant's motion for rehearing.
Jun 5 1979	Plaintiffs' motion for call upon the Office of Personnel Management filed. Copies (2) to deft. DENIED without prejudice (July 13, 1979) pending disposition of defendant's motion for rehearing.
Jun 15 1979	Defendant's objections to plaintiffs' motions for call filed. Copies (2) to atty.
Jun 19 1979	Defendant's motion for rehearing en banc filed. Copies (2) to atty
Jul 5 1979	Plaintiffs' response to defendant's motion for rehearing en banc filed. Copies (2) to deft.
Sep 28 1979	Court filed order denying defendant's motion for rehearing. Copy to parties.

Oct 2 1979	Plaintiff's motion for call upon the Office of Personnel Management filed. Copies (2) to deft. ALLOWED NOV 7 1979, and Call issued this day.
Oct 2 1979	Plaintiffs' motion for call upon the General Accounting Office filed. Copies (2) to deft. ALLOWED NOV 7 1979, and Call issued this day.
Oct 12 1979	Defendant's motion for extension of time (to Nov. 1, 1979) to respond to plaintiff's motions for call filed. Copies (2) to atty. ALLOWED OCT 15 1979.
Apr 2 1980	Plaintiffs' request for hearing to set time for compliance with plaintiffs' motion for call filed. Copies (2) to deft DISMISSED APR 15 1980 as moot, see memorandum of pretrial conference this
Apr 15 1980	Trial Judge's memorandum of pretrial conference filed. Copy to parties, GAO & OPM. [Reply by GAO 30 days].
Apr 23 1980	Plaintiffs' motion for substitution of Annette Kurtzman Proto, surviving spouse of Nicholas Proto, as a proper party plaintiff filed. Copies (2) to deft. ALLOWED MAY 9 1980.
May 13 1980	Reply of the General Accounting Office filed. Copy to parties and to OPM.
May 29 1980	Reply of the General Accounting Office [as to Nicholas J. LiBretto] filed. Copy to parties.
Jun 13 1980	Reply of the Office of Personnel Management filed. Copy to parties.
Jun 16 1980	Plaintiff's motion for substitution under Rule 66 [substitution of Margaret Devine Clark surviving widow of Joseph Clark, as a proper party plaintiff] filed. Copies (2) to deft. ALLOWED July 2, 1980.
Aug 1 1980	Stipulation for entry of judgment filed by defendant. Copies (2) to atty.

Aug 5 1980	Trial Judge's memorandum report for judgment filed. Copy to parties
Aug 8 1980	Court filed order entering judgments for plaintiffs in the amounts listed in the order. Copy to parties.
Aug 8 1980	Certified copy of transcript of judgment mailed to attorney of record.
Jan 9 1981	Notice of filing in the Supreme Court of the United States of a petition for writ of certiorari on January 5, 1981, No. 80–1121, October Term, 1980 filed.
Mar 26 1981	Order of the Supreme Court of the United States, dated March 23, 1980 granting petition for writ of certiorari filed.
Mar 27 1981	Record in re: certiorari delivered to the Supreme Court of the United States.

IN THE UNITED STATES COURT OF CLAIMS

No. 23-73

JOSEPH J. CLARK
25 First Street
Brooklyn, New York 11231

FRANK D'AVERSA
22-33 126 Street
College Point, New York 11356

NICHOLAS J. LIBRETTO
84-16 259th Street
Floral Park, New York 11001

NICHOLAS J. PROTO
140-22 Bellamy Loop
Bronx, New York 10475

CARL SCIALPI
109 Marmora Road
Parsippany, New Jersey 07054

ALBERT WOLFUS
1323 E. 87th Street
Brooklyn, New York 11236

PLAINTIFFS

v.

THE UNITED STATES,
DEFENDANT

PETITION

(Filed January 30, 1976)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The above named plaintiffs respectfully represent:

1. That the plaintiffs are citizens of the United States and residents of the States of New York and New Jersey as shown by their addresses as set forth in the caption of this petition.

2. That jurisdiction of this Court rests upon 28 U.S.C. 1491, and the Back Pay Act of 1966, 5 U.S.C. 5596.

3. That each plaintiff is employed on the Staff of the Supervisor of Shipbuilding, Conversion and Repair, Department of the Navy in Brooklyn, New York.

4. That during the period of August, 1973, through October, 1974, each plaintiff was permanently promoted from a Ship Surveyor (Wage Board WD) classification position with an hourly rate of pay to a position as a General Schedule Civil Service employee, with a per annum rate.

5. That at the time of their promotions to the GS schedule, the salaries of plaintiffs Clark, D'Aversa, Proto, Scialpi and Wolfus were properly slotted and computed, in accordance with FPM Supp. 532–1, Subchapter 8–3d, p. 56 (Pay Admin). As shown below, the salary rate of each of these plaintiffs was later erroneously reduced.

6. That at the time of his promotion from Ship Surveyor (WD classification) to Engineering Technician GS-802–11, plaintiff LiBretto's new salary was incorrectly computed in accordance with FPM Supp. 990–2, Book 531, S2–4a(2) Regulation instead of FPM Supp. 532–1, Subchapter 8–3d.

7. That on November 18, 1974, plaintiff LiBretto filed a grievance concerning his improper pay rate allocation, under the GS Schedule, with the Consolidated Civilian Personnel Office of the Navy.

8. That under date of March 6, 1975, the Head, Operations Division, Consolidated Civilian Personnel Office reaffirmed the position taken by the agency with respect to plaintiff LiBretto's pay rate under the GS schedule, and advised that since the method of computation used therein resulted in discrepancies between his rate of pay and that of the other similarly situated plaintiffs that a formal written decision and determination as to the proper method of computation was being sought from the office of Civilian Manpower Management, Pay Compensation Policies Branch, Washington, D.C.

9. That under date of March 19, 1975, the Director of Civilian Manpower Management, Department of the Navy, affirmed the position of the agency in plaintiff Libretto's case and announced that the step rates of the other plaintiffs had been incorrectly set and would therefore be ad-

justed downward in accordance with the formula applied in plaintiff LiBretto's case.

10. That under date of April 14, 1975, plaintiffs Clark, D'Aversa, Proto, Scialpi and Wolfus received notification from the Civilian Personnel Officer, Naval Support Activity, that Standard Form 50(s) and Standard Form 1126(s) would be issued on April 28, 1975, resulting in a retroactive salary step rate downgrading for these plaintiffs.

11. That under date of April 28, 1975, Standard Form 50(s) and Standard Form 1126(s) were forwarded for payroll action to the Commanding Officer, Naval Supply Center, Norfolk, Virginia 23512, for pay adjustment downward by one step. At this time a request was also made by the Commanding Officer, Naval Support Activity, Brooklyn, New York, that withholdings of retroactive overages be deferred until a determination had been made by the Navy Accounting and Finance Center (NAFC) in response to a request that a waiver of claims for erroneous payments be granted.

12. That under date of June 4, 1975, a Group Grievance was filed by plaintiffs with the Supervisor of Shipbuilding Conversion and Repair, USN Brooklyn, New York, with respect to the reduction in pay rate of these plaintiffs.

13. That under date of June 10, 1975, the Group Grievance of June 4, 1975, was rejected by the Supervisor of Shipbuilding, Conversion and Repair, USN, Brooklyn, New York.

14. That the decision of the Supervisor of Shipbuilding, Conversion and Repair, USN, Brooklyn, New York, was appealed on June 11, 1975, to the Employee Appeal Review Board, Office of the Secretary of the Navy, Washington, D.C.

15. That under date of July 18, 1975, the Office of the Secretary, Department of the Navy, affirmed the rejection of plaintiffs' Group Grievance as involving a matter outside the jurisdiction of the Supervisor of Shipbuilding, Conversion and Repair.

16. That on June 23, 1975, plaintiff Nicholas J. LiBretto appealed the June 10, 1975, decision of the Supervisor of

Shipbuilding, Conversion and Repair, USN, Brooklyn, New York, to the New York Region of the United States Civil Service Commission.

17. That under date of July 16, 1975, the Chief, Personnel Management and Evaluation Division, New York Region, Civil Service Commission, denied plaintiff LiBretto's request for a hearing and stated that after a determination by the Employee Appeal Review Board of the Department of the Navy, there would be no further right of appeal to the Civil Service Commission on an employee grievance.

18. That plaintiff, *Nicholas J. LiBretto*, was promoted, effective October 12, 1974, from a wage board position as a Ship Surveyor (machinist), WD–3414, Grade 8, level 4 (salary rate: $7.92 per hour) to the General Schedule as an Engineering Technician (Drafting), GS-11, Step 5, at a salary of $16,627. At the time of this promotion to the General Schedule, plaintiff's salary and step were incorrectly set. In accordance with the provisions of FPM Chapter 531, 2–5 and FPM Supp. 532–1, Subchapter 8 Pay Admin. 5 8–3(d), p. 56, at the time of plaintiff's promotion he should have been assigned a GS-11, Step 7 slot. Plaintiff hereby makes claim for the difference in compensation between the GS 11/7 position to which he was entitled and the GS 11/5 slot to which he was assigned, effective 10–12–74 until the date of judgment.

19. That plaintiff *Joseph J. Clark* was promoted, effective 8–18–74 from a wage board position as a Ship Surveyor (Shipfitter), WD–6204, Grade 8, Step 5 (salary rate $8.29 per hour) to the General Schedule as a Quality Assurance Specialist GS-11, Step 8, at a salary of $18,094 per annum. His salary and step were correctly computed at that time, but were erroneously revised downward to GS-11, Step 7, at a salary of $17,605 per annum by way of a Standard Form 50, dated April 28, 1975. Plaintiff hereby makes claim for the difference between the salary at the GS-11, Step 8, level to which he was continuously entitled and his salary at the GS-11, Step 7, level, from April 28, 1975, to the date of judgment and for an order directing correction of the Personnel Action of April 28, 1975, to establish his entitlement to the GS-11, Step 8, level.

20. That plaintiff *Frank D'Aversa* was promoted, effective 8–24–74 from a wage board position as a Ship Surveyor (Pipe fitter), WD–4204(77), Grade 8, Step 5 (salary rate $8.29 per hour) to the General Schedule as a Supervisory Production Controller, GS-11, Step 8, at a salary of $18,094 per annum. His salary and step were correctly computed at that time, but were retroactively and erroneously downgraded to GS-11, Step 7, at a salary of $17,605 per annum by Standard Form 50, dated April 28, 1975. Thus plaintiff's subsequent promotion to the GS-12/4 level at a salary of $20,308 per annum was also adversely affected and revised to a GS-12/3 at $19,693 per annum, instead of the 4th step. Plaintiff hereby makes claim for the difference in compensation between the GS steps to which he was entitled and those to which he was erroneously assigned, effective March 19, 1975, until the date of judgment and for an order directing correction of the personnel action of April 28, 1975, to estabblish his entitlement to the GS-11 Step 8 level.

21. That plaintiff *Nicholas J. Proto* was temporarily promoted, effective 7–2–73 from a wage board position as a Ship Surveyor (Electrician) WD-2805(77) level 8, rate 5 (salary rate $7.48 per hour) to the General Schedule as a Production Controller (Ship building), GS-11, Step 5, at a salary of $15,860 per annum. This temporary promotion was made permanent by way of Standard Form 50, dated 8–31–73, effective 9–2–73. Plaintiff's salary and step were correctly computed via correction dated 11/2/73 at that time. However, through a series of reassignments, temporary and permanent promotions, plaintiff held the position of Contract Negotiator, at the GS–12, Step 3 level, effective 10–20–74. At the time of this promotion to the GS-12 level, plaintiff's step was incorrectly set at Step 3 in order to compensate for an alleged previous erroneous slotting. Effective 2–2–75, plaintiff was reassigned to a supervisory position with no corresponding raise in pay. Plaintiff is entitled to a GS–12, Step 6, slot and hereby makes claim for the difference in salary between the GS-12/3 level and the GS-12, Step 6, from February 2, 1975, until the date of judgment, and for an order directing correction of the per-

sonnel action of April 28, 1975, to establish his entitlement to the GS–12, Step 3.

22. That plaintiff *Carl Scialpi* was temporarily promoted, effective 9–14–74, from a wage board position as a Ship Surveyor (Shipfitter), WD–6204(77), Grade 8, Step 5 (salary rate $8.29 per hour) to the General Schedule as a Contract Negotiator, GS–11, Step 8, at a salary of $18,094 per annum. However, plaintiff was subsequently downgraded one step erroneously so that upon his permanent promotion to the GS schedule, he was incorrectly slotted at GS-11/9 instead of GS-11/10. Plaintiff hereby makes claim for the difference in salary between the GS 11/9 and the GS 11/10 slots, effective 2/16/75 until the date of judgment, and for an order directing corrections of the personnel action of April 28, 1975, to establish his entitlement to the GS-11, Step 8 level.

23. That plaintiff *Albert Wolfus* was promoted, effective 11/11/73 from a wage board position as a Ship Surveyor (Machinist) WD-3414(77), Grade 8, Step 5, (salary rate $7.48 per hour) to the General Schedule, GS-11, Step 5, at a salary of $16,627 per annum. His salary and step were correctly computed at that time, but were retroactively and erroneously downgraded to GS-11, Step 3, at a salary of $15,649 per annum by Standard Form 50, dated April 28, 1975. Thus plaintiff's subsequent promotion to the GS-12/2 level at a salary of $19,078 per annum was also adversely affected and revised to a GS-12/1 at $18,463 per annum, instead of the 2nd step. Plaintiff hereby makes claim for the difference in compensation between the GS steps to which he was entitled and those to which he was erroneously assigned, effective March 19, 1975, until the date of judgment, and for an order directing correction of the personnel action of April 28, 1975, to establish his entitlement to the GS-11, Step 3 level.

24. That plaintiffs have filed no action with Congress or any agency or department of the United States, nor have instituted any judicial proceedings, save those actions outlined above.

25. That no one other than plaintiffs has been designated

owner of those claims and no assignment of claims or any part thereof has been made.

WHEREFORE, plaintiffs pray that each plaintiff shall have and recover judgment against the United States for the salary he would have received, save for the erroneous downgrading as follows:

A. Plaintiff Joseph J. Clark, the difference between GS-11, Step 8 and GS-11, Step 7, from April 28, 1975, to date of judgment.

B. Plaintiff Frank D'Aversa, the difference between GS-12, Step 4, and GS-12, Step 3, from April 28, 1975, to date of judgment.

C. Plaintiff Nicholas J. LiBretto, the difference between GS-11, Step 7 and GS-11, Step 5, from October 12, 1974, to date of judgment.

D. Plaintiff. Nicholas Proto, the difference between GS–12 Step 6, and GS–12, Step 3, from February 2, 1975, to date of judgment.

E. Plaintiff Carl Scialpi, the difference between GS–11, Step 10 and GS–11, Step 9, from February 16, 1975, until the date of judgment.

F. Plaintiff Albert Wolfus, the difference between GS–12, Step 2, and GS–12, Step 1, from March 19, 1975, to date of judgment.

Plaintiffs further seek an order directing their appointment to the appropriate steps in grade, effective as of the respective dates referred to above, correction of all records to reflect the same—and such other relief as may be proper, pursuant to authority granted to this Court.

Respectfully submitted,

JOHN I. HEISE, JR.
861 Pershing Drive
Silver Spring, Maryland 20910
585-8400
Attorney for Plaintiffs

SAMUEL RESNICOFF
280 Broadway
New York, New York 10007
Of Counsel

IN THE UNITED STATES COURT OF CLAIMS

No. 26–76

JOSEPH J. CLARK, ET AL.,
PLAINTIFF

v.

THE UNITED STATES,
DEFENDANT.

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

For its answer to plaintiff's petition herein, defendant admits, denies and alleges as follows:

1. Admits the allegations of fact in paragraph 1.

2. The allegations of paragraph 2 are conclusions of law which require no answer but to the extent that they are determined to be statements of fact they are denied.

3–4. Admits the allegations of paragraphs 3 and 4.

5–6. Denies the allegations contained in paragraphs 5 and 6.

7. Denies the allegations of paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8–9. Admits the allegations of fact in paragraphs 8 and 9.

10. Admits the allegations of fact in paragraph 10 except denies that any collection of overpayments has been made.

11–15. Admits the allegations of fact in paragraphs 11 though 15.

16–17. Admits the allegations of fact in paragraphs 16 and 17.

18. Denies the allegation that plaintiff LiBretto's salary was incorrectly set.

19. Denies the allegation that plaintiff Clark's salary was incorrectly downgraded and revised.

20. Denies the allegation that plaintiff D'Aversa's salary was incorrectly downgraded and revised.

21. Denies the allegation that plaintiff Proto's salary was incorrectly downgraded and revised.

22. Denies the allegation that plaintiff Scialpi's salary was incorrectly downgraded and revised.

23. Denies the allegation that plaintiff Wolfus' salary was incorrectly downgraded and revised.

24–25. Denies the allegations of paragraphs 24 and 25 for lack of knowledge or information sufficient to form a belief as the truth thereof.

26. Denies each and every allegation of the petition not heretofore admitted, denied, or otherwise qualified.

FIRST AFFIRMATIVE DEFENSE

27. To the extent that the plaintiffs are alleging that their positions are incorrectly classified, the plaintiffs have failed to exhaust their administrative remedies.

SECOND AFFIRMATIVE DEFENSE

28. Defendant alleges that plaintiffs have failed to state a claim against the United States upon which relief can be granted.

WHEREFORE, defendant prays that plaintiffs' petition be dismissed and that defendant may be granted such other and further relief as may be just and proper.

REX E. LEE
Assistant Attorney General
Civil Division

MICHAEL J. RUBIN
Attorney, Civil Division
Department of Justice

NAVY OVERPRINT 10 72

EMPLOYEE — See general information on Re. 3

62794 e1

1. NAME (LAST, FIRST, MIDDLE)	MR./MISS/MRS.	2. AGENCY USE	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
SCIALFI, CARLO (NMN)	MR. (M)	79400	03-28-21	0 087-12-6669

5. VETERAN'S PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	
3		1	09-25-41	

8. LEGAL AUTHORITY		10. RETIREMENT	11. (FOR CSC USE)
1		1	

12. CODE NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702 Promotion-Temporary*	09-15-74	C. S. Reg. 335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATIONAL CODE	17. GRADE OR LEVEL	17. STEP OR RATE	18. SALARY	
Ship Surveyor (Shipfitter) - 24786	WD-6204 (77)	08	05	PH	$8.29

19. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN,3RD
Quality Assurance Dept., Planning & Estimating Division, Estimating Branch
29th St. & 3rd Avenue, Brooklyn, N. Y. 11232

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATIONAL CODE	21A. (BLANK)	22. GRADE OR LEVEL	22. STEP OR RATE	23. SALARY	
Contract Negotiator - SS-18.3(a)	GS-01102		11	03	PA	$18094

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3RD
Contract/Material Dept., Contract Administration Division, Negotiation Branch
29th Street & 3rd Avenue, Brooklyn, N. Y. 11232

25. DUTY STATION (Organizational Unit)	26. LOCATION CODE
Brooklyn, Kings, N. Y.	36-4170-047

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
O&MN, 1775 - 17517804.247B Work J. C. - 62794-5-04001	1	

30. REMARKS

SEPARATION:

*This is a temporary promotion not to exceed 03-13-75 and may be terminated sooner. You will revert to your present position of Ship Surveyor (Shipfitter), WD-6204-08, Step 5, $8.29 p.h. on 14 March 1975 or sooner.

This action is taken in accordance with FPM Chapter 335, Subchapter 4 and a copy of your signed agreement to the terms of this promotion has been filed in your Official Personnel Folder.

CC: SUPSHIP THREE

Merit Promotion Anno. 74-SUPSHIP-31
P.D. attached

D. RETIREMENT PLAN	DATE OF RETIREMENT (Mo. - Day - Year)	WITHIN-GRADE PAY GRADE	UNEXPIRED SVC COMPONENT

E. WORK SCHEDULE | F. PAY RATE DETERMINANT | G. SPECIAL PROGRAM ID:

31. DATE OF APPOINTMENT

32. PERSONNEL OFFICE, EMPLOYING AGENCY
CCIO Representative, c/o IPO, 3RD
29th St. & 3rd Ave., Brooklyn, N.Y.11232

33. LOCATION
NV-24

34. SIGNATURE AND TITLE OF APPROVING OFFICIAL
E. UGO
Personnel Staffing Specialist

35. DATE 09-13-74

OFFICE NUMBER 4027

0103 — 249 — 4241
50 — 134 — 15 1. EMPLOYEE COPY

15

STANDARD FORM 50—Rev. December 1961
U.S. Civil Service Commission
FPM Chap. 296

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE — See General Information on Reverse)

NAVY OVERRIDE 12-72
(NPT)

1. AGENCY USED: 62794			
1. NAME (LAST, FIRST, MIDDLE; MR., MRS., MISS): SCIALPI, Carlo (NMN) MR. (M)	2. AGENCY USED: 9 F7[illegible]400	3. BIRTH DATE (Mo., Day, Year): 03-28-21	4. SOCIAL SECURITY NO.: 0 087-12-6668
5. VETERAN PREFERENCE	6. TENURE GROUP	7. SERVICE COMP. DATE	
8. PEOPLE	10. RETIREMENT	11.	
12. CODE AND NATURE OF ACTION: 715 Correction Change to Lower Grade	13. EFFECTIVE DATE (Mo., Day, Year): 02-16-75	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY	
15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL: 07 (b) STEP OR RATE	18. SALARY: PA $18577
19. NAME AND LOCATION OF EMPLOYING OFFICE			
20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(a) SERVICE CLASS	22. (a) GRADE OR LEVEL (b) STEP OR RATE
24. NAME AND LOCATION OF EMPLOYING OFFICE: Supervisor of Shipbuilding, Conversion and Repair 29th Street & 3rd Avenue Brooklyn, N.Y. 11232		Quality Assurance Dept. Planning and Est. Div. Estimating Branch	
25. DUTY STATION (City - County - State)			26. LOCATION CODE: 36-4170-047
27. APPROPRIATION: O&MN, 1975-#1751804.2476 Job Order #62794-5-03002	28. POSITION OCCUPIED	29. APPORTIONED POSITION	
30. REMARKS			
SEPARATIONS: SHOW REASONS BELOW AS REQUIRED UNDER APPLICABLE REGULATIONS			

Corrects item 17(b) from 08
Corrects item 18 from $19093

Corrections made in accordance with directive contained in OCHM ltr 5312:GHC
dtd 19 March 1975

D. RETIRED UNIFORMED SERVICE UNIFORMED SERVICE DESIGNATION	DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO. - DAY - YEAR)	UNIFORMED SVC PAY GRADE	UNIFORMED SVC COMPONENT
E. WORK SCHEDULE	F. PAY RATE DETERMINANT	G. SPECIAL PROGRAM ID	
31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other Authentication) AND TITLE: A. MANNEBACH Head, Operations Division		
32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office): CCPO, NAVSUPPACT, Brooklyn, N.Y. 11251	35. DATE: 04-28-75	36. SUBMITTING OFFICE NUMBER: 2567	
33. CODE: NV-24			

DEPARTMENT OF THE NAVY

0100-900-4241
50—134—15 1. EMPLOYEE COPY

SF 50-B (Rev. December 1965)
U.S. Civil Service Commission
FPM Chap. 295

(EMPLOYEE – See General Information on Reverse)

NAVY OVERPRINT 10-72
(7 PP.)

(FOR AGENCY USE)
5279h

1 NAME (CAPS) LAST-FIRST-MIDDLE	MR. MRS. MISS	2 (FOR AGENCY USE)	3 BIRTH DATE (Mo. Day. Year)	4 SOCIAL SECURITY NO.
[redacted], ALBERT (NMI)	MR.	F79 0	08-31-21	0 [redacted]

5 VETERAN PREFERENCE	5A FOR AGENCY USE	6 TENURE GROUP	7 SERVICE COMP. DATE	[illegible]
2		1	03-09-42	

9 FEGLI	10 RETIREMENT	11 (FOR CSC USE)
1	1	

12 CODE NATURE OF ACTION	13 EFFECTIVE DATE (Mo. Day. Year)	14 CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702 Promotion	11-11-73	C. S. Reg. 335.102

15 FROM: POSITION TITLE AND NUMBER	16 PAY PLAN AND OCCUPATION CODE	17 (a) GRADE OR LEVEL	(b) STEP OR RATE	18 SALARY
Ship S rveyor (Machinist) - 78785	WB-3413 (77)	08	05	PA $7.48

19 NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Estimating Div., Advance Planning Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

20 TO: POSITION TITLE AND NUMBER	21 PAY PLAN AND OCCUPATION CODE	21(a) FUNCT CLASS	22 (a) GRADE OR LEVEL	(b) STEP OR RATE	23 SALARY
Contract Negotiator - GS-10.1	GS-01102		11	05	PA $16527

24 NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Comptroller/Material Dept., Contract Administration Div., Negotiation Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

25 DUTY STATION (City - county - State)	26 LOCATION CODE
Brooklyn, Kings, N. Y.	36-h170-0h7

27 APPROPRIATION	28 POSITION OCCUPIED	29 APPORTIONED POSITION
0[illegible], 1974 - 17h80h.2h73 Navy J. C. - 0279h-h-0h001	1	

30 REMARKS
A SUBJECT TO COMPLETION OF 1
B SERVICE COUNTING TOWARD CAREER OR PERMANENT TENURE
1613 PROBATIONARY OR TRIAL PERIOD COMMENCING

SEPARATIONS SHOW REASONS BELOW AS REQUIRED CHECK IF APPLICABLE
C DURING PROBATION

Promotion made in accordance with Merit Promotion Program.

Employee has read and accepts as a condition of employment a requirement for rotation or reassignment at intervals of no less than four years.

CC: SUPSHIP TURKS

D. RETIRED UNIFORMED SERVICE
UNIFORMED SERVICE DESIGNATION
DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO - DAY - YEAR)
UNIFORMED SVC PAY GRADE
UNIFORMED SVC COMPONENT

E WORK SCHEDULE
F PAY RATE DETERMINANT
G SPECIAL PROGRAM ID

31 DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34 SIGNATURE (Or other Authentication) AND TITLE
	T. H. CO Personnel Staffing Specialist
32 OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office) Supervisor of Shipbuilding, Conv & Repair, USN 29th St. & 3rd Ave., Brooklyn, N. Y. 11232	35 DATE 11-03-73
33 COPY EMPLOYING DEPARTMENT OR AGENCY 17-24 DEPARTMENT OF THE NAVY	36 A SUANTING OFFICE NUMBER 4427

0105 - 200 — 4241
50 — 134 — 15

1. EMPLOYEE COPY

19

STANDARD FORM 50—No. December 1981
U.S. Civil Service Commission
FPM Chap. 296

( ) NOTIFICATION OF PERSONNEL ACTION ( )

(EMPLOYEE — See General Information on Reverse)

NAVY OVERPRINT 10.72 (7-FT)

(FOR AGENCY USE)
62794

1. NAME (CAPS) LAST, FIRST, MIDDLE — MR., MISS, MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
WOLFUS, Albert (NMN) Mr. (M)	0-F79400	08-31-21	068-12-5986

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	

9. FEGLI	10. RETIREMENT	11. (FOR CSC USE)

12. CODE NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702 Correction Promotion	03-28-75	

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY	
			03	PA	$16513

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(a) FUNCT CLASS	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY	
				01	PA	$18463

24. NAME AND LOCATION OF EMPLOYING OFFICE

Supervisor of Shipbuilding, Conversion & Repair, USN
29th Street &3rd Avenue
Brooklyn, N.Y. 11232

Contract/Material Dept.
Contract Administration Div.

25. DUTY STATION (City - County - State)	26. LOCATION CODE
	36-4170-047

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
O&MN, 1975 - #1751804.247B Job Order #62794-5-04001	1 COMPETITIVE SERVICE 2 EXCEPTED SERVICE	CODE / 1 PRIMARY 2 WORKING / TO / STATE

30. REMARKS
A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY (OR TRIAL) PERIOD BEGINNING
B. SERVICE COUNTING TOWARD CAREER (OR PERMANENT TENURE) FROM
C. RETAINED PROBATION

SEPARATIONS SHOW REASONS BELOW AS REQUIRED BY LAW OR REGULATION

Corrects items 17(b) and 18 from 05 and $17545
Corrects items 22(b) and 23 from 02 and $19078

Corrections made in accordance with directive contained in OCMA ltr 5312:emc
dtd 19 March 1975

32. RETIRED UNIFORMED SERVICE				
UNIFORMED SERVICE DESIGNATION	DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO. - DAY - YEAR)	UNIFORMED SVC PAY GRADE	UNIFORMED SVC COMPONENT	

1. WORK SCHEDULE	2. PAY RATE DETERMINANT	3. SPECIAL PROGRAM ID

34. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	35. SIGNATURE (Or typed authentication) AND TITLE
	A. MANNEBACH Head, Operations Division

37. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	38. DATE	39. AGENCY CERTIFICATION NUMBER
CCPO, NAVSUPPACT, Brooklyn, N.Y. 11251	04-28-75	2567

40. CODE	EMPLOYING DEPARTMENT OR AGENCY
NV-2R	DEPARTMENT OF THE NAVY

0100—200—4241
60—134—15 1. EMPLOYEE COPY

Best Copy Available

NOTIFICATION OF PERSONNEL ACTION

1. NAME (Last, First, Middle)	2. DEPT. OR AGENCY (Est.)	3. BIRTH DATE (Mo. Day, Year)	4. SOCIAL SECURITY NO.
HROTO, NICHOLAS J.	F79h	06-26-26	119-16-9597

5. VETERAN PREFERENCE	6. TENURE GROUP	7. SERVICE COMP. DATE	
2	1	01-03-45	

8. FICA	9. RETIREMENT	10.
4	1	

12. COA	NATURE OF ACTION	13. EFFECTIVE DATE (Mo. Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702	Promotion-Temporary	07-02-73	C. S. Reg. 335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. GRADE OR LEVEL	17. STEP OR RATE	18. SALARY
Ship Surveyor (Electrician) - JK787	WD-2805(77)	08	05	PH - $7.68

19. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Estimating Div., Estimating Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	22. GRADE OR LEVEL	22. STEP OR RATE	23. SALARY
#5025 Production Controller (Shipbuilding)	GS-01152	11	05	PA - $15860

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Progress Div., Ship Superintendent's Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

25. DUTY STATION (City, County, State)	26. LOCATION CODE
Brooklyn, Kings, N. Y.	30-4170-067

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
0208, 1974 - #17411804.2473	1 COMPETITIVE SERVICE	FROM / TO / STATE

30. REMARKS
* SUBJECT TO COMPLETION OF ___ YEAR PROBATIONARY OR TRIAL PERIOD COMMENCING ___
* SERVICE COUNTING TOWARD CAREER (OR PERMANENT) TENURE FROM ___

SEPARATIONS SHOWN BELOW AS REQUIRED. CHECK IF APPLICABLE ☐ * DURING PROBATION

This is a temporary promotion not to exceed 10-29-73. You will be returned to your former position of Ship Surveyor (Electrician), WD-2805(77)-08 on or before the expiration date of this temporary promotion.

This promotion is an exception to the Merit Promotion Program as employee is being promoted to a position from which previously demoted.

CC: SUPSHIP THREE

Best Copy Available

6152-125

31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other authentication) AND TITLE
32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office) CCPO Representative, c/o PRO, 3ND 29th St. & 3rd Ave., Brooklyn, N.Y. 11232	E. Lugo Personnel Staffing Specialist
33. CODE: EMPLOYING DEPARTMENT OR AGENCY NV-24 DEPARTMENT OF THE NAVY	35. DATE 07-02-73 4027

0109 - 200 - 4240
90 - 134 - 15

1. EMPLOYEE COPY

1 NAME (Last, First, Middle)	2 FOR AGENCY USE	3 BIRTH DATE (Mo., Day, Year)	4 SOCIAL SECURITY NO.
[illegible], [illegible] J.	[illegible]	[illegible]	[illegible]

5 VETERAN PREFERENCE	5a FOR AGENCY USE	6 TENURE GROUP	7 SERVICE COMP. DATE	8 [illegible]
2		1	01-13-[illegible]	[illegible]

9 FEGLI	10 RETIREMENT	11 FOR OPM USE
1	2	

12 CODE	NATURE OF ACTION	13 EFFECTIVE DATE (Mo., Day, Yr.)	14 CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702	Re-[illegible]ppointment	09-02-73	C. S. R. 335.102

15 FROM: POSITION TITLE AND NUMBER	16 PAY PLAN AND OCCUPATION CODE	17 GRADE OR LEVEL	17 STEP OR RATE	18 SALARY
[illegible] Inspector (Electrician) - 7H787	GS-850(77)	09	05	PA 7.16

19 NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, FB
Quality Assurance Dept., Planning & Estimating Div., Painting Branch
29th Street & 3rd Avenue, Brooklyn, N. Y. 11232

20 TO: POSITION TITLE AND NUMBER	21 PAY PLAN AND OCCUPATION CODE	21 [illegible] CLASS	22 GRADE OR LEVEL	22 STEP OR RATE	23 SALARY
[illegible] Production Controller(Shipbuilding)	03-0112		11	05	PA [illegible]

24 NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, FB
Quality Assurance Dept., Progress Div., Ship Performance Branch
29th Street & 3rd Avenue, Brooklyn, N. Y. 11232

25 DUTY STATION (City - County - State)	26 LOCATION CODE
Brooklyn, Kings, N. Y.	36-[illegible]-27

27 APPROPRIATION	28 POSITION OCCUPIED	29 APPORTIONED POSITION
Work F.C. 17[illegible]-4-0302	1	

30 REMARKS

SEPARATIONS

This promotion removes temporary limitation placed on original action.

Employee has read and accepts as a condition of employment a requirement for rotation or reassignment at intervals of approximately four years.

CC: SUPSHIP

Best Copy Available

D. RETIRED UNIFORMED SERVICE: UNIFORMED SERVICE DESIGNATION	DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO. - DAY - YEAR)	UNIFORMED SVC PAY GRADE	UNIFORMED SVC COMPONENT

E. WORK SCHEDULE	F. PAY RATE DETERMINANT	G. SPECIAL PROGRAM ID

31. DATE OF APPOINTMENT AFFIDAVIT (Agency use only)	34. SIGNATURE (Or other Authentication) AND TITLE
	E. LUGO [illegible] Personnel Staffing Specialist

32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	35. DATE	36. SUBMITTING OFFICE NUMBER
[illegible] 2041 [illegible] Brooklyn, N.Y. 11232	08-31-73	L027

33. CODE	EMPLOYING DEPARTMENT OR AGENCY
NV-21	DEPARTMENT OF THE NAVY

0161 - 200 - 4241
SO - 134 - 15

1. EMPLOYEE COPY

U.S. Civil Service Commission
FPM Chap. 295

EMPLOYEE – See General Information on Reverse

NAVY DEPARTMENT

FOR AGENCY USE

0279h

1. NAME (CAPS) LAST FIRST MIDDLE	MR. MISS. MRS.	2. FOR AGENCY USE	3. BIRTH DATE (Mo. Day. Year)	4. SOCIAL SECURITY NO.
PICTO, THOMAS J.	MR.	[illegible]	06-26-26	[illegible]

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	8. [illegible]
2		1	01-23-56	[illegible]

9. LEGAL AUTHORITY	10. POSITION	11. (FOR CSC USE)
1	1	

12. CODE NATURE OF ACTION	13. EFFECTIVE DATE (Mo. Day. Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
721 Normal Grade	11-11-73	C. S. Reg. 351.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY
25025 Production Controller (Ship Alteration)	GS-01152	11	06	PA 17716

19. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3rd
Quality Assurance Brch., Production Div., Ship Superintendent's Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(b) FUNCT. CLASS	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY
Contract Negotiator - NEG-15	GS-01102		11	06	PA 17716

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3rd
Contract Administration Section, Planning Administration Div., Negotiation Branch
29th St. & 3rd Ave., Brooklyn, N. Y. 11232

25. DUTY STATION (City, County, State)	26. LOCATION CODE
Brooklyn, Kings, N. Y.	36-[illegible]-31

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
0173, 19?h - 17?0/0?h.2?73 Work A. C. 0279?-?-?h??	1 Competitive Service / 2 Excepted Service	Date / Agency / Bureau / State

30. REMARKS
A. Subject to completion of [illegible] year probationary period (Trial Period for Conversion)
B. Service Counting Toward Career or Career-Conditional Appointment

SEPARATIONS (Show reason, action and effective date of separation) C. During Probation

Merit Promotion Announcement 73-SUPSHIP-3

Employee has read and accepts as a condition of employment a requirement for rotation or reassignment at intervals of no less than four years.

CC: SUPSHIP Team

Best Copy Available

D. RETIRED UNIFORMED SERVICE
UNIFORMED SERVICE DESIGNATION | DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO. DAY. YEAR) | UNIFORMED SVC PAY GRADE | UNIFORMED SVC COMPONENT

E. WORK SCHEDULE | F. PAY RATE DETERMINANT | G. SPECIAL PROGRAM ID

31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other Authentication) AND TITLE
	E. DIGG Personnel Staffing Specialist

32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	33. CODE / EMPLOYING DEPARTMENT OR AGENCY	35. DATE	36. SUBMITTING OFFICE NUMBER
29th St. & 3rd Ave., Brooklyn, N. Y. 11232	17-24 DEPARTMENT OF THE NAVY	11-05-73	4027

0109 — 200 — 4241
50 — 134 — 15

STANDARD FORM 50 — Rev. December 1981
U.S. Civil Service Commission
FPM Chap. 295

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE — See General Information on Reverse)

NAVY OVERPRINT 10 7.
17 PI

4

(FOR AGENCY USE)
62794

1. NAME (CAPS) LAST-FIRST-MIDDLE	MR. MISS MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
D'AVERSA, FRANK (NMN)	MR.	F79400	06-25-20	C 070-14-4716

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	[redacted]
2		1	01-22-46	

9. FEGLI	10. RETIREMENT	11. (FOR CSC USE)
1	1	

12. CODE NATURE OF ACTION		13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702	Promotion-Temporary	05-26-74	C. S. Reg. 335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY	
Ship Surveyor (Pipefitter) - #4796	WD-4204 (77)	08	05	PH	$7.89

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(b) FUNCT. CLASS.	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY	
Supvy Production Controller (Shipbuilding) - SS-59	GS-01152		11	07	PA	$17605

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Estimating Div., Estimating Branch
29th Street & 3rd Avenue, Brooklyn, N. Y. 11232

25. DUTY STATION (City - county - State)	26. LOCATION CODE
Brooklyn, Kings, N. Y.	36-4170-047

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
O&MN, 1974 - #1741804.2473 Work J. O. 62794-4-03001	1	

30. REMARKS.
A. SUBJECT TO COMPLETION OF ___ YEAR PROBATIONARY (OR TRIAL) PERIOD COMMENCING: ___
B. SERVICE COUNTING TOWARD CAREER OR PERMANENT TENURE FROM ___
C. DURING PROBATION

SEPARATIONS: SHOW REASONS BELOW, AS REQUIRED. CHECK IF APPLICABLE

This is a temporary promotion not to exceed 08-23-74 and may be terminated sooner. You will revert to your present position of Ship Surveyor (Pipefitter), WD-4204-08, JD #4796 on 08-23-74 or sooner.

This action is taken in accordance with FPM Chapter 335, Subchapter 4 and a copy of your signed agreement to the terms of this promotion has been filed in your Official Personnel Folder.

CC: SUPSHIP THREE

D. RETIRED UNIFORMED SERVICE: UNIFORMED SERVICE DESIGNATION: ___ DATE OF RETIREMENT FROM UNIFORMED SERVICE: (MO - DAY - YEAR) ___ UNIFORMED SVC PAY GRADE: ___ UNIFORMED SVC COMPONENT: ___

E. WORK SCHEDULE ___ F. PAY RATE DETERMINANT: ___ G. SPECIAL PROGRAM ID: ___

31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)

34. SIGNATURE (Or other Authentication) AND TITLE
E. LUCO
Personnel Staffing Specialist

32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)
CCPO Representative, c/o LFO, 3ND
29th St. & 3rd Ave., Brooklyn, N.Y.11232

33. CODE NV-24 EMPLOYING DEPARTMENT OR AGENCY
DEPARTMENT OF THE NAVY

35. DATE 05-25-74

35.a. SUBMITTING OFFICE NUMBER 4027

52

0109 — 200 — 4241
80 — 134 — 15 1. EMPLOYEE COPY

Best Copy Available

STANDARD FORM 50 — Rev. (September 1981
U.S. Civil Service Commission
FPM Chap. 295

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE — See General Information on Reverse)

NAVY OVERPRINT

(FOR AGENCY USE)
62794

1. NAME (CAPS) LAST-FIRST-MIDDLE	MR./MISS/MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
D'AVERSA, FRANK (NMI)	MR.	F79400	06-25-20	0 070-14-4716

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE
1 = NO 3 = 10 PT. DISAB 5 = 10 PT. Other 2 = 5 PT. 4 = 10 PT. Comp			

9. FEGLI	10. RETIREMENT	11. (FOR CSC USE)
1 = ELIGIBLE 3 = WAIVED 4 = CONVERTIBLE 5 = Opt	1 = CS 3 = FS 5 = OTHER 2 = FICA 4 = NONE	

12. CODE NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
002 CORRECTION 702 Promotion-Temporary	05-26-74	

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL (b) STEP OR RATE	18. SALARY
			PH $8.29

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(b) FUNCT. CLASS.	22. (a) GRADE OR LEVEL (b) STEP OR RATE	23. SALARY
			08	PA $18094

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Estimating Div., Estimating Branch
29th Street & 3rd Avenue, Brooklyn, N. Y. 11232

25. DUTY STATION (L. + County + State)	26. LOCATION CODE

27. APPROPRIATION	28. POSITION OCCUPIED (1 = COMPETITIVE SERVICE, 2 = EXCEPTED SERVICE)	29. APPORTIONED POSITION (FROM, TO, STATE; 1 = PROVED, 2 = WAIVED)
Work J. O. 62794-4-03001		

30. REMARKS
A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY (OR TRIAL) PERIOD COMMENCING
B. SERVICE COUNTING TOWARD CAREER OR PERMANENT TENURE FROM
SEPARATIONS: SHOW REASONS BELOW AS REQUIRED. CHECK IF APPLICABLE C. DURING PROBATION

Corrects item 18 from PH-$7.89
Corrects item 22(b) from 07
Corrects item 23 from PA-$17605

This correction is made in accordance with DOD Wage Fixing Authority ltr of 5/14/74, and NAVSUPPACTNOTE 12531, Ch.1 of 5/30/74.

CC: SUPSHIP THREE

D. RETIRED UNIFORMED SERVICE
UNIFORMED SERVICE DESIGNATION: ☐ DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO - DAY - YEAR): ☐☐☐☐☐☐ UNIFORMED SVC PAY GRADE: ☐☐ UNIFORMED SVC COMPONENT: ☐

E. WORK SCHEDULE ☐ F. PAY RATE DETERMINANT ☐ G. SPECIAL PROGRAM ID: ☐☐

31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other Authentication) AND TITLE
	E. LUCO Personnel Staffing Specialist

32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	35. DATE	36. SUBMITTING OFFICE NUMBER
CCPO Representative, c/o NFO, 3ND 29th St. & 3rd Ave., Brooklyn, N.Y.11232	06-05-74	4027

33. CODE	EMPLOYING DEPARTMENT OR AGENCY
NV-24	DEPARTMENT OF THE NAVY

0109 — 200 — 4241
50 — 134 — 15 1. EMPLOYEE COPY

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81

STANDARD FORM 50 — Rev. December 1981
U.S. Civil Service Commission
FPM Chap 295

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE — See General Information on Reverse)

NAVY OVERPRINT 10-92
(7-PT)

(FOR AGENCY USE)
62794

1. NAME (CAPS) LAST-FIRST-MIDDLE	MR.-MISS-MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
D'AVERSA, FRANK (NMN)	MR.	F79400	06-25-20	070-14-4716

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	[redacted]
2		1	01-22-46	

9. PEGL	10. RETIREMENT	11. (FOR CSC USE)
1	1	

12. CODE	NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702	Promotion - Permanent	08-24-74	C. S. Reg. 335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY	
#4796 Ship Surveyor (Pipefitter)	WD-4204(77)	08	05	PH	$8.29

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(a) INCENT. CLASS.	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY	
SS-22 Supvy Production Controller (Shipbuilding)	GS-01152		11	08	PA	$18094

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Estimating Division, Advance Planning Branch
29th St. & 3rd Avenue, Brooklyn, N.Y.11232

25. DUTY STATION (City - county - State)	26. LOCATION CODE
Brooklyn, Kings, N.Y.	36-4170-047

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
O&MN,1975-91751804.247B Work J.O.62794-5-02001	1	

30. REMARKS
A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY OR TRIAL PERIOD COMMENCING
B. SERVICE COUNTING TOWARD CAREER (OR PERMANENT) TENURE FROM

SEPARATIONS (Show reason(s) below, as required, if block applicable) C. DURING PROBATION

This action terminates temporary promotion NTE-08-23-84
Selection made in accordance with Merit Promotion Program

CC: SUPSHIP THREE

Best Copy Available

31. RETIRED UNIFORMED SERVICE: UNIFORMED SERVICE DESIGNATION	DATE OF RETIREMENT FROM UNIFORMED SERVICE: (MO - DAY - YEAR)	UNIFORMED SVC PAY GRADE	UNIFORMED SVC COMPONENT

E. WORK SCHEDULE	F. PAY RATE DETERMINANT	G. SPECIAL PROGRAM ID

32. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or other Authentication) AND TITLE
	E. LUGO Personnel Staffing Specialist

33. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	35.a SUBMITTING OFFICE NUMBER
CCPO Representative, c/o NFO, 3ND 29th St. & 3rd Ave., Brooklyn, N.Y.11232	4027

36. CODE	EMPLOYING DEPARTMENT OR AGENCY	35. DATE
NS-24	DEPARTMENT OF THE NAVY	08-22-74

50

83

01-30 — 200 — 4241
80 — 134 — 15 1. EMPLOYEE COPY

(EMPLOYEE – See General Information on Reverse)

62794

1. NAME (CAPS) LAST FIRST MIDDLE	MR., MISS, MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
LIBRETTO NICHOLAS J.	MR. (M)	F 794-00 4	01-30-30	9 108-22-7859

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	
2	10	1	03-15-51	00

8. FEGLI	10. RETIREMENT	11. (FOR CSC USE)
1	1	

12. CODE	NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702	Promotion	10-12-74	Reg 335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY	
Ship Surveyor (machinist) SS-27.2	WD-3414	03	04	PH	$00792

19. NAME AND LOCATION OF EMPLOYING OFFICE

Quality Assurance Department
Planning & Estimating Division
Estimating Branch
6-794-00

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21A. FUNCT. CLASS.	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY	
P.D. 4690 Engineering Technician (Drafting)	GS-00802		11	05	PA	$16,627

24. NAME AND LOCATION OF EMPLOYING OFFICE

Supervisor of Shipbuilding, Conversion & Repair, USN, 3rd Planning Department
29th Street & Third Avenue Technical Support Division
Brooklyn, New York 11232 Technical Coordination Branch

25. DUTY STATION (City - County - State)
Brooklyn, Kings, New York

26. LOCATION CODE
36-4170-047

27. APPROPRIATION
O&M, 1975 - #1751804.2473
J.O. #62794-5-02001

28. POSITION OCCUPIED
1 = COMPETITIVE SERVICE
2 = EXCEPTED SERVICE
1

29. APPORTIONED POSITION
FROM: TO: STATE
1 = PROPOSED 2 = APPROVED

30. REMARKS
A. SUBJECT TO COMPLETION OF 1 YEAR PROBATIONARY OR TRIAL PERIOD BEGINNING:
B. SERVICE COUNTING TOWARD EARLIER OR PERMANENT TENURE FROM:

SEPARATIONS SHOW REASONS BELOW, AS REQUIRED. CHECK IF APPLICABLE C. DURING PROBATION

Merit Promotion; anno. 74-SUPSHIP-27

FLSA: Non-exempt

P.D. attached.

CC: SUPSHIP 3

Best Copy Available

31. RETIRED UNIFORMED SERVICE: UNIFORMED SERVICE DESIGNATION:
DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO - DAY - YEAR):
UNIFORMED SVC PAY GRADE:
UNIFORMED SVC COMPONENT:

32. WORK SCHEDULE: F
33. PAY RATE DETERMINANT: 0
G. SPECIAL PROGRAM ID: 00

34. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)

35. SIGNATURE (Or other Authentication) AND TITLE
FRED RISSMEYER
Personnel Staffing Specialist

36. (For use of this form by activities other than the Civil Service Commission)
2/Lt. Rose, C/O Navy Finance Office
2nd St. & 3rd Avenue, Brkyn, NY 11232

37. EMPLOYING DEPARTMENT OR AGENCY
DEPARTMENT OF THE NAVY

38. DATE 11 October 1974

39. SUBMITTING OFFICE NUMBER
4027

NV-24

1. EMPLOYEE COPY

APPLICATION FOR PERSONNEL ACTION

(EMPLOYEE - See reverse for additional information or instructions)

62794

1. NAME (LAST, FIRST, MIDDLE)	MR, MISS, MRS	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
CLARK, JOSEPH J.	MR.	F79400	06-21-22	053-12-1589

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	8. [illegible]
2		1	12-05-41	[illegible]

9. TYPE	10. RE-EMPLOYMENT	11. (FOR CSC USE)
1	1	

12. FROM: NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702 Promotion	08-18-74	C.S.Reg.335.102

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. GRADE OR LEVEL	17. STEP OR RATE	18. SALARY	
SS-23 Ship Surveyor (Shipfitter)	WD-6204	08	05	PH	$8.29

19. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept.,Planning & Estimating Division, Estimating Branch
29th St. & 3rd Avenue, Brooklyn, N.Y.11232

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21. (FOR CSC USE) CLASS.	22. GRADE OR LEVEL	22. STEP OR RATE	23. SALARY	
SS-31 Quality Assurance Specialist (Process)	GS-01910		11	08	PA	$18094

24. NAME AND LOCATION OF EMPLOYING OFFICE
Supervisor of Shipbuilding, Conversion & Repair, USN, 3ND
Quality Assurance Dept., Planning & Process Control Division
29th St. & 3rd Avenue, Brooklyn, N.Y. 11232

25. LOCATION CODE
36-4170-047

Brooklyn, Kings, N.Y.

OMB,1973-0175180A,24B
W rk 3.0,62794-5-03001

27. TYPE APPT.	28. APPROPRIATION/FUNDING
1	

Selection made in accordance with Navis Promotion Program.

CC: SUPSHIP THREE

36. DATE OF APPOINTING OFFICER'S SIGNATURE	37. SIGNATURE AND TITLE OF APPOINTING OFFICER
	E. LIGO [illegible] Personnel Staffing Specialist

CCPO Representative, c/o NFO, 3ND
29th St. & 3rd Ave., Brooklyn, N.Y.11232

38. AGENCY CLASSIFICATION	39. EMPLOYING DEPARTMENT OR AGENCY	40. DATE	41. PERSONNEL OFFICE IDENTIFIER
NV-24	DEPARTMENT OF THE NAVY	08-16-74	4027

23

1. EMPLOYEE COPY

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STANDARD FORM 50 -- Rev. December 1981
U.S. Civil Service Commission
FPM Chap. 296

NOTIFICATION OF PERSONNEL ACTION

(EMPLOYEE — See General Information on Reverse)

NAVY OVERPRINT 10-72 (7-71)

(FOR AGENCY USE)
62794

1. NAME (CAPS) LAST-FIRST-MIDDLE	MR.-MISS-MRS.	2. (FOR AGENCY USE)	3. BIRTH DATE (Mo., Day, Year)	4. SOCIAL SECURITY NO.
CLARK, Joseph J. Mr. (M)		F79400	06-21-22	0 053-12-1589

5. VETERAN PREFERENCE	5A. FOR AGENCY USE	6. TENURE GROUP	7. SERVICE COMP. DATE	
1. NP 3. 10 PT DISAB 5. 10 PT OTHER 2. 5 PT 4. 10 PT COMP				

9. FEGLI	10. RETIREMENT	11. (FOR CSC USE)
1 ENROLLED (Regular) — WAIVED (Optional) 2 INELIGIBLE 3 WAIVED 4 ENROLLED (Reg. Only)	1 CS 3 FS 5 OTHER 2 FICA 4 NONE	

12. CODE NATURE OF ACTION	13. EFFECTIVE DATE (Mo., Day, Year)	14. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
702 Correction Promotion	08-18-74	

15. FROM: POSITION TITLE AND NUMBER	16. PAY PLAN AND OCCUPATION CODE	17. (a) GRADE OR LEVEL	(b) STEP OR RATE	18. SALARY

19. NAME AND LOCATION OF EMPLOYING OFFICE

20. TO: POSITION TITLE AND NUMBER	21. PAY PLAN AND OCCUPATION CODE	21(a) FUNCT. CLASS	22. (a) GRADE OR LEVEL	(b) STEP OR RATE	23. SALARY
				07	PA $17605

24. NAME AND LOCATION OF EMPLOYING OFFICE

Supervisor of Shipbuilding, Conversion & Repair, USN
29th Street & 3rd Avenue
Brooklyn, N.Y. 11232

Quality Assurance Dept.
Planning & Process
Control Division

25. DUTY STATION (City - county - State)	26. LOCATION CODE
	36-4170-047

27. APPROPRIATION	28. POSITION OCCUPIED	29. APPORTIONED POSITION
O&MN, 1975 - #1751804.247B Job Order #62794-5-02001	1 COMPETITIVE SERVICE 2 EXCEPTED SERVICE	1 OCCUPIED 2 VACANT

30. REMARKS

SEPARATIONS

Corrects item 22(b) from 08
Corrects item 23 from $18094

Corrections made in accordance with directive contained in OCHM letter 5312:emc
dtd 19 March 1975/

Best Copy Available

D. RETIRED UNIFORMED SERVICE
UNIFORMED SERVICE DESIGNATION
DATE OF RETIREMENT FROM UNIFORMED SERVICE (MO - DAY - YEAR)
UNIFORMED SVC PAY GRADE
UNIFORMED SVC COMPONENT

E. WORK SCHEDULE
F. PAY RATE DETERMINANT
G. SPECIAL PROGRAM ID

31. DATE OF APPOINTMENT AFFIDAVIT (Accessions only)	34. SIGNATURE (Or name, Authentication) AND TITLE
	A. HANNEBACH Head, Operations Division
32. OFFICE MAINTAINING PERSONNEL FOLDER (If different from employing office)	
CCPO, NAVSUPPACT, Brooklyn, N.Y. 11251	
33. FOR EMPLOYING DEPARTMENT OR AGENCY	35. DATE 04-28-75
NV-24 DEPARTMENT OF THE NAVY	35A. PERSONNEL OFFICE IDENTIFIER 2567

0109 — 700 — 4241
80 — 134 — 15 1. EMPLOYEE COPY

88

NAVAL SUPPORT ACTIVITY
136 Flushing Avenue
Brooklyn, New York 11251

IN REPLY REFER TO:
NAVSUPPACTNOTE 12531 CH-1
20/LCF:def
30 May 1974

NAVAL SUPPORT ACTIVITY BROOKLYN NOTICE 12531 of 20 May 1974, CHANGE TRANSMITTAL, 1

Subj: Implementation of Pay Adjustment for Federal Prevailing Rate System

Encl: (1) Copy of Adjusted Wage Rate Schedule

1. *Background. The DoD Wage Fixing Authority* has issued pay adjustments to the Federal Wage System Regular and Special Production Facilitating Wage Rate Schedules for the New York, N.Y. Wage Area, based upon Termination of the Economic Stabilization Program. The adjusted schedule rates are effective 12 May 1974.

2. *Purpose.* To promulgate Change 1 to NAVAL SUPPORT ACTIVITY BROOKLYN NOTICE 12531 of 20 May 1974.

3. *Action.* Remove enclosure (1) to subject Notice and insert new Enclosure (1). Ensure that each wage grade employee affected by this change be given a copy of this change transmittal.

/s/ _____
W. P. HOLDEN

Distribution
(COMTHREE/COMNAVRASENYKINST 5216.8G)
List A
CCPO Distribution List

U.S. NAVY INTERNATIONAL LOGISTICS CONTROL OFFICE, BAYONNE

REGULAR WAGE RATE SCHEDULE

NON-SUPERVISORY	*GRADE*	*1st*	*2nd*	*3rd*	*4th*	*5th*
Warehouseman	WG-5	4.60	4.79	4.98	5.17	5.36
Motor Vehicle Operator	WG-6	4.79	4.99	5.19	5.39	5.59
Laborer	WG-3	4.20	4.38	4.56	4.73	4.91
Laborer	WG-1	3.81	3.97	4.13	4.29	4.45

FEDERAL WAGE SYSTEM REGULAR WAGE RATE SCHEDULE
SUPERVISOR OF SHIPBUILDING CONVERSION & REPAIR
(BROOKLYN, N.Y.)

RATING *NON-SUPERVISORY*	*GRADE*	*1st*	*2nd*	*3rd*	*4th*	*5th*
Ship Surveyor (Shipfitter)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Machinist)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Electrician)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Electronics Mechanic)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Pipefitter)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Progressman (Pipefitter)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Boilermaker)	WD-8	6.79	7.16	7.54	7.92	8.29
Ship Surveyor (Ordnance Equipment Mechanic)	WD-8	6.79	7.16	7.54	7.92	8.29

NAVAL SUPPORT ACTIVITY
138 Flushing Avenue
Brooklyn, New York 11251

20:ACM:mc
12210
Ser 303
4 March 1975

From: Consolidated Civilian Personnel Officer, Naval Support Activity, Brooklyn
To: Office of Civilian Manpower Management (OCMM-53), Washington, D.C.
Subj: Determination of Pay Fixing in Processing Promotions from Ungraded to Graded and Graded to Ungraded; request for advice and clarification of interpretation concerning
Encl: (1) Copy of SF50—Promotion, N. Libretio, from Ship Surveyor (Machinist) to Engineering Technician GS-332-11
(2) Copy of SF50—Promotions, Six Employees, from Ship Surveyor to Graded Positions at GS-11 grade level

1. Subsequent to effecting enclosure (1), the employee raised verbal and written inquiries as to how his pay was determined. As a result of the inquiry and review of the personnel action we reply to the inquiry, it has come to the attention of this Office that two different interpretations and formulas were used in determining the pay entitlement of employees who were promoted from ungraded positions to graded positions. Enclosures (1) and (2) represent the discrepancy occasioned by the difference in interpretation.

2. Since there appears to be no provision in the FPM concerning pay setting policy in the case of promotion of employees from *per diem* to *per annum* positions, advice and clarification of Office of Civilian Manpower Management (OCMM) policy is herewith requested. Specifically what we have in the instant cases of enclosure (1) and (2) is the following:

a. In the case of Mr. Libretto of enclosure (1), the Per-

sonnel Staffing Specialist set the rate of pay by using this formula:

(1) Multiplying the hourly pay by 2080 hours (7.92 x 2080 = $16,4763.69).

(2) The pay amount fell between two rates of pay (Step 4 of GS–11 was $16,138 and Step 5 of SG–11 was $16,627), and so he was given the higher rate of pay or Step 5, $16,627, (new $17,545) since an employee promoted from ungraded to graded must receive at least equivalent salary.

b. In the case of the other six personnel of enclosure (2), the Personnel Staffing Specialist set the rate of pay by using this formula:

(1) They were given an additional step in their present grade plus the higher grade in the General Schedule if it fell between two steps. (Applying the regulation for the Federal Wage System as outlined in *FPM Supplement 532–1* Subchapter 8–3d, page 56, on Pay Administration).

3. Naturally this difference in interpretation has resulted in pay discrepancies. Accordingly this Office, at the request of the Supervisor of Shipbuilding, Conversion and Repair USN, Brrokly, New York requests your interpretation and policy guidance relative to the subject matter concerning the pay setting policy in the case of "promotion" of employees from per diem to per annum positions, and conversely from per annum to per diem.

4. Should the highest previous rate regulation used in enclosure (1) be the applicable policy, overpayments to the six employees in enclosure (2) would be involved. Should this be the case, being an administrative error it is our recommendation the claims be waived in whole for erroneous payments of pay to these civilian employees, as provided for in Section V, Chapter 220 of Navy Comptroller Manual.

5. Your advice and written clarification on the subject matter is requested.

G. J. Di Cicco

Copy to:
SUPSHIPS USN, Bklyn (Captain Mitchell)
CCPO, NSA, Bklyn

DEPARTMENT OF THE NAVY
Office of Civilian Manpower Management
Washington, D.C. 20390

From: Director of Civilian Manpower Management
To: Commanding Officer, Naval Support Activity, 136 Flushing Avenue, Brooklyn, New York 11251

Subj: Determination of pay fixing in processing promotions from wage to General Schedule

Ref: (a) CCPO, NAVSUPPACT Brooklyn ltr 20: ACM:mc 12210 Ser 303 of 4 Mar 1975
(b) FPM Supplement 532-1
(c) FPM Supplement 990-2, Book 531, S2-5a(1)
(d) FPM Supplement 990-2, Book 531, S2-5a(2)
(e) FPM Supplement 990-2, Book 531, S2-4a(2)

1. Reference (a) requests advice in the matter of determining the appropriate step-rate in which to place an employee upon promotion from a wage position to a General Schedule position.

2. Our review of the information provided by reference (a) indicates that Mr. Libretto's pay was set correctly when he was promoted to the GS-11 position, but that the pay-setting determinations in the other six cases were in error. The provisions of reference (b), including those providing for a one-step increase upon promotion, are applicable only to changes *to* or *within* the Federal Wage System.

3. Changes to the General Schedule are processed in accordance with the provisions of FPM Supplement 990-2, Book 531. The promotion rule of reference (c) is not applicable to promotions from wage positions to General Schedule positions, however, as it is specifically limited by reference (d) to changes from one General Schedule position to another General Schedule position.

4. Since the promotion rule of reference (c) is not applicable to promotions from wage positions to General Schedule positions, the pay-setting determination in such cases must be made in accordance with the highest previous rate rule of reference (e). Under the highest previous rate rule, Mr. Libretto's pay has been set at the maximum step-rate per-

missible, and the step-rates of the other six employees must be adjusted downward.

5. With regard to the overpayments involved, requests for waivers of erroneous payments are matters under the jurisdiction of the Comptroller of the Navy. The employees involved should be advised that they may submit such requests in accordance with the Navy Comptroller Manual.

E. B. RILEY
by Direction

Copy to:
ROCMM Philadelphia

Best Copy Available

180

Date 17 JAN. 1975

No reply to this letter has been received. Please expedite reply.

Has any action been taken?

18 NOV. 1974

FROM : N. LIBRETTO

TO : CONSOLIDATED CIVILIAN PERSONNEL OFFICE

VIA : CODES 180, 100, 1/17/75

SUBJ. : RATE OF PAY APPEAL

ENCL. : (1) N. LIBRETTO'S FORM 50 OF 11 OCT 1974
(2) F.P.M. CHAPTER 531 SUBCHAPTER 2 - DETERMINING RATE OF BASIC PAY

1- DESCRIBED IN ENCL (1), PERSONNEL ACTION WAS TAKEN FOR MY PROMOTION FROM SHIP SURVEYOR, WAGE BOARD TO ENGINEERING TECHICIAN UNDER THE GENERAL SCHEDULE RATES (G.S.)

2- MY PAY RATE AS A SHIP SURVEYOR WAS #7.92 PER HOUR. MY NEW PAY RATE IN THE G.S. RATES IS #7.99 PER HOUR. THIS RATE WAS ARRIVED AT BY SIMPLY MOVING FROM WAGE BOARD RATES TO THE NEAREST RATE IN THE G.S. RATES. (THIS IS EQUAL TO A GRADE 11 - 5TH STEP)

2- ENCL (2) "SECTION 2-2 DEFINITIONS", PARAGRAPH (a) GIVES THE MEANING OF "HIGHEST PREVIOUS RATE" AS THE

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BASIC PAY PREVIOUSLY PAID AN EMPLOYEE REGARDLESS OF WHETHER OR NOT THE POSITION WAS SUBJECT TO THE PAY SCHEDULES OF THE GENERAL SCHEDULE. (GS)
PARAGRAPH (6) - DEFINES THE WORD "PROMOTION" AND (L) DEFINES RATE OF PAY AS "UNDER AUTHORITY", WHICH WOULD COVER WAGE BOARD RATES.

4- SECTION 2-4 "POSITION OR APPOINTMENT CHANGES", OF ENCL (2) SETS FORTH THE BASIC POLICIES FOR THE COMPUTA OF THE EMPLOYEE'S HIGHEST PREVIOUS RATE IN PARAGRAPH 4. AS STATED "THIS INVOLVES DETERMINING THE EQUIVALENT GS RATE IN TERMS OF THE GS PAY SCHEDULE AT THE TIME OF THE PREVIOUS RATE AND CONVERTING IT TO THE CURRENT RATE FOR THE SAME RATE AND GRADE TO ARRIVE AT THE EMPLOYEE'S HIGHEST PREVIOUS RATE".

5- SECTION 2-5 "PROMOTIONS", OF ENCL (2) CLEARLY STATES THAT AN EMPLOYEE WHO IS "PROMOTED" WILL HAVE HIS RATE SET IN THE GRADE AT AN AMOUNT EQUAL TO TWO WITHIN-GRADE INCREASES OF THE GRADE FROM WHICH HE WAS PROMOTED.

6- BASED ON THE FACTS AS OUTLINED I SUBMIT THE FOLLOWING

Best Copy Available

(a) Calculations Based on Previous Pay Rate :-

Ship Surveyor - 5TH Step	$	8.29 Per Hr.
Ship Surveyor - 4TH Step	$	7.92 Per Hr.
- Differential		.37 Per Hr.
Two Step Increase		.74 Per Hr.
New Pay Rate		8.66 Per Hr.

(b) Calculations Based on Moving To GS and Then Increase :-

Ship Surveyor - 4TH Step	$	7.92 Per Hr.
Nearest Pay (GS 11-5TH Step)	$	7.99 Per Hr.
Two Step Increase (GS 11-7TH Step)	$	8.46 Per Hr.

7. - Therefore it is my opinion that my New Pay Rate was improperly arrived at and action should be immediately undertaken to correct the rate of pay.

W. J. Le Blanc

UNITED STATES GOVERNMENT
MEMORANDUM

20A:ACM:mc
6 March 1975

To: Mr. Nicholas J. Libretto, Eng. Technician (Drafting) GS–802–11
Supv. of Shipbuilding, Conversion and Repair, Brooklyn, N.Y.

From: Head, Operations Division, Consolidated Civilian Personnel Office, Naval Support Activity, Brooklyn, N.Y. 11251

Subject: Rate of Pay Appeal

Ref: (a) Memo of 18 Nov 1974 of addressee to CCPO, Via Codes 180, 205, 240 with two enclosures, and follow-up letter of 21 Feb 1975 with tracer letter of 17 Jan 1975 attached

1. Reference (a) has been reviewed and your pay rate has been found to be correct as interpreted. By way of explanation, the following is provided:

a. In paragraph 5 of your memo you cite that "Section 2–5 'Promotions of FPM Chapter 531 Subchapter 2—Determining Rate of Basic Pay' clearly states than an employee who is "promoted" will have his rate set in the grade at an amount equal to two within-grade increases of the grade from which he was promoted.

The reference you cite is strictly for promotions within the General Schedule rates. Your promotion was from an ungraded rating to graded rate or position, involving two different pay plans, and so 2–5 cited in your memo is not applicable. Therefore your calculations in paragraph 6 are not applicable.

b. For your information, the formula to use in computing the highest previous rate from "wageboard" to "general schedule" is to multiply the hourly pay by 2080 hours, and if the highest rate previously received falls between two rates of the new grade, the Agency may consider the higher of the two rates as the highest previous rate (FPM

Supp. 532-1, Subchapter 8, S-8-3e-5). This was the formula used in computing your pay:

1) Current rate of pay multiplied by 2080 hours (7.92 x 2080= $16,473.60).

2) It falls between 2 rates of pay, you get the higher. This was your case (Step 4, GS-11 was $16,138; Step 5, GS-11 was $16,627) and so we gave you Step 5 of GS-11 ($16,627), presently $17,545.

2. It is my understanding that as a result of your promotion action, and previous verbal inquiry, it was brought to our attention that in other instances a Personnel Staffing Specialist from this office did not apply the above formula but rather fixed the pay by giving an additional step in the present grade plus the higher grade in the General Schedule if it fell between two steps. Naturally this difference in interpretation has resulted in discrepancies. This office is in the process of seeking a formal written decision and determination from the Office of Civilian Manpower Management, Pay Compensation Policies Branch, Washington, D.C. on these matters.

In the interim period SUPSHIPS Brooklyn has held in abeyance the taking of any action to change the pay rates assigned, with possible over payment refunds due in the other cases.

3. Upon recepit of reply from OCMM corrective SF 50 pay actions as may be necessary will be taken.

4. It is hoped this explanation will inform you as to how your pay entitlement was determined, and request your bearing with us until we receive clarification and advice from OCMM.

ARTHUR MANNEBACH

Copy to:
SUPSHIPS Bklyn
AFGE 2868

NAVAL SUPPORT ACTIVITY
136 Flushing Avenue
Brooklyn, New York 11251

20A: ACM:lch
LL/
14 April 1975

From: Civilian Personnel Officer, Naval Support Activity
To: *(See Page 2)
Subj: Corrected Standard Form 50's: advance info relative to
Ref: (a) OCMM ltr 5312:emc dated 19 Mar 1975
(b) FPM 531

1. Reference (a) directs this activity to correct the error made in determining the pay rate to which you were entitled at the time you were promoted from a Wage Board position you held of Ship Surveyor to a graded position.

2. The purpose of this letter is merely to inform you in advance that this Office is in the process of preparing personnel actions correcting the errors, which actions will result in a salary/step rate downward adjustment. You will be issued on 28 April 1975 *Standard Form 50(s)* and Standard Form 1126(s) which will reflect the reconstructed corrections, which actions will be retroactive to the date shown in item 13 of the SF-50(s) and item 9 of the SF-1126(s).

3. This office plans on requesting the Payroll Office at Norfolk, Virginia to hold in abeyance the deducting or collecting of the "retroactive overages" that have been paid you, since this office will be requesting the Navy Accounting and Finance Center to approve a waiver in whole of claims for the erroneous payments made you due to administrative error. However, this office wishes to point out that the determination as to whether or not to wait for "approval of a waiver" from the Navy Accounting and Finance Center before collecting the retroactive pay overages is not within our province but that of the Payroll Office at Norfolk.

4. The corrective actions must be taken because a governing regulation, reference (b), on pay setting policy was misinterpreted and misapplied in fixing your pay at the time of the promotion referred to in paragraph 1 above. This action is not a grievable or appealable issue since pay setting is based on statutes. Naturally however, you or your representatives can go to the Comptroller General or the U.S. Civil Service Commission for a decision based on our present application of the pay setting regulations reviewed and directed by reference (a).

5. Any action you may chose to take will not affect our implementing the subject matter at this time.

G. J. DiCicco

Copy to:
SUPSHIPS
AFGE, Local #2868
CCPO (OPF)

To: Mr. Joseph J. Clark, Quality Assurance Specialist (Process) GS-1910-11
Mr. Harold J. Copp, Supv Production Controller (Shipbldg), GS-1152-11
Mr. Frank D'Aversa, Supv Production Controller (Shipbldg), GS-1152-12
Mr. Nicholas J. Proto, Supv Contract Specialist, GS-1102-12
Mr. Carlo Scialpi, Ship Surveyor (Shipfitter), ND-6204-8
Mr. Albert Wolfus, Contract Negotiator, GS-1102-12

NAVAL SUPPORT ACTIVITY
130 Flushing Avenue
Brooklyn, New York 11251

20A:AM:mc
12210
28 April 1975

From: Commanding Officer, Naval Support Activity, Brooklyn, New York
To: Commanding Officer (Code 52.23)
Naval Supply Center, Norfolk, Virginia 23512

Subj: Corrective Personnel Actions Involving Pay Overages and Retroactive Pay Adjustments Downward

Ref: (a) CCPO, NAVSUPPACT Brooklyn ltr 20:AMC:mc 12210, ser 303 of 4 Mar 1975 with enclosures (1) and (2)
(b) OCMM ltr 5312:emc of 19 Mar 1975
(c) Navy Comptroller Manual (NAVSO-P1000), Vol 3, Chapter 3, Section V

Encl: (1) SF 50 and SF 1126 in connection with J. CLARK
(2) SF 50 and SF 1126 in connection with H. COPP
(3) SF 50's and SF 1126 in connection with F. D'AVERSA
(4) SF 50's and SF 1126's in connection with N. PROTO
(5) SF 50's and SF 1126 in connection with C. SCIALPI
(6) SF 50's and SF 1126 in connection with A. WOLFUS
(7) Copy of Reference (a)
(8) Copy of Reference (b)

1. Subsequent to references (a) and (b), enclosures (1) through (6) have been prepared and are forwarded for payroll action. It is requested that the payroll office of your Activity hold in abeyance collecting retroactive overages from employees concerned resulting from corrective ac-

tions, enclosures (1) through (6). This Activity on behalf of, and at the request of the Supervisor of Shipbuilding, Conversion and Repair, USN, Brooklyn is requesting of the Navy Accounting and Finance Center (NAFC) that they grant a waiver of claims for erroneous payments of pay to these civilian employees due to administrative error, as provided for in reference (c). It is further requested that your payroll office advise us of the overages due as of the date you effect the corrective action. In addition, it is also requested that your payroll office provide us with the citation to the voucher or vouchers upon which the enrroneous payment was made, as required by item 6 of paragraph 3b of reference (c).

2. It is requested that withholdings of retroactive averages be deferred until a determination is received from NAFC in response to our request that retroactive overages be waived. This request for waiver is predicated on our belief that the employees concerned should not be penalized for an inadvertent administrative error brought about by difference in interpretation as explained in references (a) and (b).

3. Copies of references (a) and (b) are also forwarded as enclosures (7) and (8).

G. J. DiCicco
By direction

Copy to:
SUPSHIPS, USN, Brooklyn
AFGE, Local #2868
CCPO(OPF)(6)

4 June 1975

From: N. LiBretto, J. Clark, N. Proto, C. Scialpi, F. D'Aversa, A. Wolfus

To: Supervisor of Shipbuilding, Conversion and Repair, Brooklyn—Code 100

Subj: Group Grievance Against Management Action Resulting In Reduction To A Lower Step Within Grade Of Promoted Employees

Ref: (a) Notification of Reduction to a Lower Step Within Grade Via SF 50's
(b) OCMM ltr Serial 5312 dtd 19 Mar 75
(c) FPM Supplement 532–1 Sub-Chapter 8–3d pg. 56
(d) FPM Supplement 990–2 Book 531 S2–4a(2)
(e) CCPO ltr dtd 4 Mar 75
(f) FPM Supplement 990–2 Book 531 S2–7 para d.

1. We grieve management's action (be ref. (a)) to reduce promoted employees to a lower step within grade resulting in a corresponding loss of pay.

2. Management reasons (via ref. (b)) for the action are erroneous and incorrect. The provisions of reference (c) do indeed apply and the rate rule of reference (d) is *not* applicable.

3. The formula used by CCPO (para 2b of ref (e)) in computing the pay step of the promoted employees initially was the correct method as evidenced by their original action.

4. The formula to be used in the promotion of a Per Diem employee to a Gen'l Scheduler's position (as per ref. (c)) is a 3 step process.

a. 1st Step is to determine the per diem employee's adjusted rate of pay. Re: *annual* pay.

b. 2nd Step is to place him in equivalent grade in the Gen'l Wage System.

c. 3rd Step is to process 2 step increase via promotion formula under GS schedule.

5. The promotions involved required two subsequent actions at the same time—change from one pay system to another, then a promotion under the new pay system to another, then a promotion under the new pay system and regulations state, "The agency shall process the changes in the order which gives the employee the maximum benefit".

6. Management's action (ref (a)) was improper and in direct violation of regulations in ref. (f).

7. We request a hearing with the Supervisor at his convenience. We also request advance notice be given in order to arrange for a AFGE representative to be present at the meeting.

_____

N. LIBRETTO

_____

J. CLARK

_____

N. PROTO

_____

C. SCIALPI

_____

F. D'AVERSA

_____

A. WOLFUS

Copy to:
N. LiBretto
C. Scialpi
J. Clark
N. Proto
F. D'Aversa
A. Wolfus
Code 180
FILE
2ND DIST. OFFICE

DEPARTMENT OF THE NAVY
Supervisor of Shipbuilding
Conversion and Repair, USN
Federal Office Building
3rd Avenue & 29th Street
Brooklyn, New York 11232

100:LGM:mw
12770
Ser 1231
10 June 1975

From: Supervisor of Shipbuilding, Conversion and Repair, USN
Brooklyn, N.Y.

To: Mr. N. LIBRETTO
Mr. J. CLARK
Mr. N. PROTO
Mr. C. SCIALPI
Mr. F. D'AVERSA
Mr. A. WOLFUS

Subj: Group Grievance

Ref: (a) Your ltr of 4 June 1975

1. Your grievance submitted in reference (a) is rejected, in as much as the action I took was directed by higher authority. You are advised herewith that you may appeal this rejection within 15 days of your receipt of this letter of decision. You should address your appeal to:

Office of the Secretary of the Navy
The Employee Appeal Review Board
Washington, D.C.

Via: Supervisor of Shipbuilding, Conversion and Repair, USN Brooklyn, N.Y.

2. Should you desire to pursue this matter further, you should select one of your group to serve as the grievant whose case will be the representative one. Whatever deci-

sion is reached for the designated grievant will apply equally to all other employees in the group.

/s/ _____
L. G. MITCHELL

Copy to:
CCPO
180
Mr. J. Ventre, Pres. Local 2868, AFGE

11 June 1975

From: Albert Wolfus
To: Office of the Secretary of the Navy
The Employee Appeal Review Board
Washington, D.C.

Via: Supervisor of Shipbuilding, Conversion and Repair, USN Brooklyn, N.Y.

Subj: Group Grievance Rejection; Appeal of

Ref: (a) Supervisor of Shipbuilding, Conversion & Repair, USN Brooklyn, N.Y. letter Ser 1231 dated 10 June 1975
(b) Group Grievance letter dated 4 June 1975

Encl: (1) Civilian Personnel Office letter 20A:ACM dated 14 April 1975
(2) Consolidated Civilian Personnel Officer letter 20:ACM, Ser 303 dated 4 March 1975

1. By reference (a) the Supervisor has rejected reference (b) by reason of direction of higher authority (OCMM).

2. I find the rejection and the reason (See Encl. (1)) unacceptable because it doesn't answer reference (b) and hereby appeal this decision.

3. I am forwarding references (a) and (b) and Enclosures (1) and (2) for your perusal and request a hearing at the earliest possible date at which time I would like to be represented by my Union Representative, Mr. Ed Karalis, AFGE National Rep. I also request that Mr. Karalis be given copies of all correspondence.

/s/ _____
ALBERT WOLFUS
American Federation of Government Employees (AFL-CIO)
300 Main Street
Orange, N.J. 07050
Att: Mr. Ed Karalis

C/C:
CCPO
AFGE Local 2868
AFGE District 2 Rep.
N. Libretto
J. Clark
H. Proto
C. Scialpi
F. D'Aversa

100:LGM:mw
12770
Ser 1233
Jun 17, 1975

FIRST ENDORSEMENT on ltr dated 11 June 1975 of Albert Wolfus on Group Grievance Appeal

From: Supervisor of Shipbuilding, Conversion and Repair, USN
Brooklyn, N.Y.

To: Office of the Secretary of the Navy
The Employee Appeal Review Board
Washington, D.C.

Subj: Group Grievance Rejection; appeal of

Encl: (3) Copy of OCMM ltr 5312:emc of 19 Mar 1975

1. The basic correspondence is forwarded for appropriate action.

2. This Activity rejected the appeal as non-grievable since it involved a matter of interpretation of Federal Personnel Regulations made by the central personnel headquarters for Navy (OCMM). Their concurrent directive to implement the determination is set forth in enclosure (3), received in reply to this Activity's request as noted in enclosure (2) of this appeal.

3. Several meetings have been held with the grievant and local AFGE representatives on this matter. Inasmuch as the actions taken by this Activity have been as a result of direction from higher authority no useful purpose would be served by additional meetings at a local level.

/s/ _____
L. G. MITCHELL

Copy to:
CCPO
AFGE Local 2868 (Mr. J. Ventre)
AFGE District 2 Rep (Mr. E. Karalis)
SUPSHIP Brooklyn (Code 180)

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, D.C. 20350

18 JUL 1975

From: Secretary of the Navy
To: Mr. N. Libretto
Mr. J. Clark
Mr. N. Proto
Mr. C. Scialpi
Mr. F. D'Averso
Mr. A. Wolfus
Via: Supervisor of Shipbuilding, Conversion and Repair, USN
Brooklyn, New York 11232

Subj: Your Protest of the rejection of your grievance

1. The complete case record of your protest of the rejection of your grievance has been thoroughly reviewed and carefully considered.

2. It has been determined that your dissatisfaction is not appropriate for processing under the Administrative Grievance Procedure as it involves matters of pay outside the jurisdiction of the Supervisor of Shipbuilding, Conversion and Repair. Accordingly, the rejection of your grievance was proper. Any further review of the pay matters should be forwarded to one of the agencies set forth in the Civilian Personnel Officer, Naval Support Activity letter of 14 April 1975.

3. This decision exhausts your request to have this matter considered under the Administrative Grievance Procedure.

/s/ _____
FRANK A. ROBEY, JR.
By direction

Copy to:
Mr. J. Ventre
Mr. E. Karalis, Rep.
CPO, Naval Support Activity

DIGEST—NO CIRCULATION

UNITED STATES GENERAL ACCOUNTING OFFICE
Washington, D.C. 20548

DEC 30 1975

In Reply refer to
B-172706.05 (KM)

Mr. Jack E. Hicks
1973d Communications Squadron
(AFCS) /XRP
Maxwell Air Force Base, Alabama 36112

Dear Mr. Hicks:

This is in reply to your letter of October 3, 1975, in which you request information as to whether your basic rate of pay was correctly established incident to your *promotion from a Federal Wage System (FWS) position*, WS-2502, grade 13, step 5, *to a General Schedule (GS) position*, grade GS-11, step 7. Specifically, you explain that, upon your promotion, you received less than a one step increase in pay and inquire as to whether your promotion entitled you to the equivalent of *a two-step*, within grade increase. Both the Civil Service Commission (Atlanta Region) and the Air Force have advised you that you were not entitled to such increase.

Section 5334(b), title 5, United States Code (1970), provides that an employee who is promoted to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of pay by not less than two step increases of the grade from which he was promoted. However, *the requirements of section 5334(b) apply only to transfers and promotions from one GS position to another.* See Federal Personnel Manual Supplement 990-2, book 531, subchapter S2-5a(2)(a)(ii) (Revised July 1969). Your Standard From 50 (Notification of Personnel Action) indicates that you were *promoted from an FWS position to a position subject to the General Schedule.* Inasmuch as you were not promoted from one GS position to another, the provisions of section 5334(b) do not apply in your case.

Moreover, the Civil Service Commission, under the authority of 5 U.S.C. §5334(a) (1970), has prescribed regulations which govern *promotions from the FWS to a position subject to the General Schedule.* These regulations provide that when such an employee is promoted, the employing agency *may pay him at any rate of his grade which does not exceed his highest previous rate.* However, if the highest previous rate falls between two rates of the new applicable grade, the employing agency may apply the higher rate. Federal Personnel Manual Supplement 990–2, book 531, subchapter S2–4a(2) (Revised July 1969).

The record indicates that the Air Force, in accordance with the foregoing, determined that your highest previous rate fell between two rates of the applicable grade and applied the higher of the two. Therefore, it appears that the pay setting action incident to your promotion from FWS to GS was proper and you received the maximum allowable entitlement. Regarding your question as to whether the applicable regulation is inequitable and discriminatory against the FWS employee being promoted to a GS position, we do not believe that it is basically inequitable. In this connection the Civil Service Commission in its letter to you dated September 11, 1975, pointed out that *the regulation also applies to a GS employee going from a GS position to a FWS position.*

We trust the above will be of assistance to you.

DANIEL W. MARTIN
Deputy Assistant
General Counsel

DIGEST–NO CIRCULATION

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

APR 19 1972

Mr. John F. Griner, National President
American Federation of Government Employees
400 First Street, N.W.
Washington, D.C. 20001

Dear Mr. Griner:

Further reference is made to your letter of November 18, 1971, reference 4/L–3109, and letter of January 18, 1972, reference 4/L–3109, from Mr. George R. Boss, Director, Labor Management Department, concerning the proper salary rate of certain employees of the Joliet Army Ammunition Plant, Department of the Army, who were *promoted from wage board positions to Classification Act (General Schedule) positions.*

In view of the nature of your inquiry, we requested the Department of the Army under dates of December 13, 1971, and February 10, 1972, to furnish us a report in the matter. A copy of the reply of the Department dated March 23, 1972, enclosed, indicates that the personnel office at Joliet Ammunition Plant is now applying *the highest previous rate rule* in determining the rate of compensation of employees when promoted from wage board positions to General Schedule positions. Also, employees' records are being reviewed and corrective action is being taken retroactively to give those employees who had previously been promoted the benefit of their highest previous rate.

Sincerely yours,

CARL P. FRIEND
Assistant General Counsel

Enclosure
lmc

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-191352 DATE: September 13, 1978

MATTER OF: Paul J. Thibeault—Promotion from General Schedule Position to Wage Schedule Position

DIGEST: Naval Shipyard employee received two successive promotions which resulted in his pay being adjusted with each promotion. Employee claims his pay rate should have been set at his highest previous rate in accordance with Shipyard "repromotion" regulation. That regulation was not applicable since employee was not demoted and later promoted to former position as contemplated by "repromotion" regulation. Employee's rate was properly adjusted under Shipyard "promotion" regulation when he was promoted from General Schedule to Wage Schedule.

This action concerns the claim filed by Mr. Paul J. Thibeault, an employee of the Portsmouth Naval Shipyard in Portsmouth, New Hampshire, for a pay adjustment in connection with his promotion from Production Controller, a General Schedule position, to Ship Scheduler, a prevailing rate (Wage Schedule) position. At issue is whether or not the Shipyard properly applied the provision of its regulation for setting pay rates upon promotion.

Mr. Thibeault was promoted from Ship Scheduler (Electrician) WD-08, step 5, $6.49 per hour, to Production Controller GS-09, step 6, $6.51 per hour, effective September 30, 1973. Subsequently, effective January 18, 1976, he was promoted from Production Controller GS-09, step 7, $7.78 per hour, to Ship Scheduler (Electrician) WD-08, step 3, $8.25 per hour. As a result of a reclassification action on January 18, 1976, the duties of Ship Scheduler were redefined and the need for Production Controllers was eliminated in the Ship Scheduling area.

Mr. Thibeault states that his progression was via Merit Promotion. He believes that upon promotion to Ship

Scheduler in January 1976, his pay rate should have been set at WD–08, step 5, instead of WD–08, step 3. He claims that the activity disregarded Portsmouth Naval Shipyard Instruction (PNSI) 12552.4A in determining his pay level. Mr. Thibeault's pay rate was set under the provision of the regulation pertaining to setting rates upon *promotions* and Mr. Thibeault believes the rate should have been set under the provision dealing with *repromotions*.

The Shipyard issued PNSI 12552.4a on March 2, 1972, to implement Federal Personnel Manual (FPM) Supplements 990–2 and 532–1 and Civilian Manpower Management Instructions (CMMI) 531.S2 and 532.8. It sets forth the Shipyard's policy for setting pay rates when employees are appointed, reemployed, or changed from one position to another. Subparagraph 1b(2) of Enclosure (1) of PNSI 12552.4A, which is in accord with FPM Supplement 532–1, S8–3d (June 30, 1975), reads in pertinent part as to "promotions:"

> "When an employee is promoted to a Wage Schedule position, his pay will be fixed at the lowest step of the new position that will result in an increase at least equal to one step increase in the position from which being promoted. When such an increase is in excess of the maximum scheduled step of the position to which promoted, he will be given the maximum scheduled step or his present salary rate, whichever is higher * * *."

The "repromotions" provisions of PNSI 12552.4A subparagraph 1b(3) of Enclosure (1) provides in pertinent part:

> "When an employee is repromoted to a position which he formerly held, or to another position in the same line of work or progression, his pay step will be fixed at a step above the minimum prescribed above based on his 'highest previous rate' * * * The 'highest previous rate' will not be used when it was earned in a position from which the employee was demoted or separated at his own request or for personal cause."

On the date of Mr. Thibeault's promotion to Ship Scheduler in January 1976, his pay level was GS–09, step 7,

$7.78 per hour. He was thus entitled, under the "promotions" provision quoted above, to an increase to at least $7.99 per hour, the rate for GS–09, step 8. Accordingly, Mr. Thibeault's pay level was set at WD–08, step 3, $8.25 per hour.

The term "repromotion" is not defined in PNSI 12552.4. However, that term is generally used when an employee is demoted and later promoted to his former grade. See 43 Comp. Gen. 507 (1964). This meaning is apparently the one used in the repromotion regulation at issue since its last sentence makes the "highest previous rate" inapplicable when the employee was demoted or separated at his own request. In this connection, the record shows that Mr. Thibeault's hourly rate was increased from $6.49 to $6.51, when he was promoted from WD–08 to GS–09 in 1973. Therefore, it is clear that he was not demoted and later promoted within the contemplation of subparagraph 1b(3) relating to repromotions. Accordingly, his pay rate was set properly under the regulation covering promotions from General Schedule positions to Wage Grade positions.

In view of the foregoing, Mr. Thibeault is not entitled to a pay adjustment from WD–08, step 3, to WD–08, step 5, effective January 18, 1976.

/s/ _____

MILTON J. AOCOLAN
Acting Comptroller General
of the United States

Supreme Court of the United States

No. 80-1121

UNITED STATES, PETITIONER,

v.

JOSEPH J. CLARK, ET AL.

ORDER ALLOWING CERTIORARI. File March 23, 1981.

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

Office-Supreme Court, U.S.
FILED
FEB 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1121

IN THE

Supreme Court of the United States

October Term 1980

UNITED STATES OF AMERICA
Petitioner

v.

JOSEPH J. CLARK, *et al.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

BRIEF IN OPPOSITION

JOHN I. HEISE, JR.
Counsel of Record
861 Pershing Drive
Silver Spring, Maryland 20910
(301) 585-8400
Attorney for Respondents

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

QUESTION PRESENTED

Was the opinion of the United States Court of Claims correct in applying the provisions of 5 U.S.C. 5334(b) [which provide for a two-step increase upon promotion] to the promotions of respondents from Wage Board positions to positions in the General Schedule.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTE AND REGULATION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Allstate Insurance Co. v. *United States*,
550 F.2d 629, 213 Ct. Cl. 96 (1977) 10

Brown v. *Allen*, 344 U.S. 443 (1953) 6

Borroughs Corporation v. *United States*,
Ct. Cl. No. 251-78 (March 19, 1980) 9

Farrell Lines Inc. v. *United States*,
499 F.2d 587, 204 Ct. Cl. 482 (1974) 10

Federal Maritime Commission v. *Seatrain Lines Inc.*,
411 U.S. 726 (1973) 9

Fields v. *United States*, 205 U.S. 292 (1907) 5

Hamilton Shoe Co. v. *Wolf Brothers*,
240 U.S. 251 (1916) 5

Kellerman v. *United States*,
504 F.2d 1128, 205 Ct. Cl. 484 (1974) 18

Magnum Import Co. v. *Coty*,
262 U.S. 159 (1923) 5

Nordstrom v. *United States*,
177 Ct. Cl. 818 (1966) 8

Rice v. *Sioux City Memorial Park Cemetery*,
349 U.S. 70 (1955) 7

Robinson v. *Lundrigan*,
227 U.S. 173 (1913) 9

Roemer v. *Board of Public Works of Maryland*,
426 U.S. 736 (1976) 5

Shapiro v. *United States*,
335 U.S. 1 (1948) 12

Shea v. *Vialpando*,
416 U.S. 251 (1974) 9

United States v. *Causby*,
328 U.S. 256 (1946) 5

United States v. *Esnault Pelteric*,
303 U.S. 26 (1938) 5

United States v. *Missouri P.R. Co.*,
278 U.S. 269 (1929) 10

Statutes and Regulations:

Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 2

28 U.S.C. 1491 7

5 U.S.C. 5334(b) ..... *passim*

28 U.S.C. 2501 6

5 C.F.R. Part 531 2

Miscellaneous:

Federal Personnel Manual, Chapter 532 ..... 2, 11

IN THE

Supreme Court of the United States

October Term 1980

No. 80-1121

UNITED STATES OF AMERICA
Petitioner

v.

JOSEPH J. CLARK, *et al.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

BRIEF FOR JOSEPH J. CLARK, et al. IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a-8a) is reported at 599 F.2d 411.

JURISDICTION

The judgment of the United States Court of Claims was entered on May 16, 1979, and a Petition for Rehearing was denied on September 28, 1979 (Pet. App. 15a-16a). The Petition for a Writ of Certiorari was filed on January 5,

1981. The Jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTE AND REGULATION INVOLVED

1. 5 U.S.C. 5334(b) provides in pertinent part:

> "(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two-step increases of the grade from which he is promoted or transferred . . ."

2. 5 C.F.R. 531.202(h) provides:

> "(h) Promotion means a change of an employee, while continuously employed, from: (1) one General Schedule grade to a higher General Schedule grade; or (2) a lower rate paid under authority other than Subchapter III of Chapter 53 of Title 5, United States Code, to a higher rate within a General Schedule grade."

STATEMENT OF THE CASE

The case involves the proper pay slotting of respondents upon promotion from the Wage Board to General Schedule positions. Wage Board employees are skilled and semi-skilled "blue collar" workers. The pay rate of Wage Board employees is on an hourly basis in accordance with the prevailing wage in the local area according to the Coordinated Federal Wage System (Federal Personnel Manual, Chapter 532). The General Schedule, on the other hand, is a separate wage system whereunder salaries are uniform nationwide. General Schedule salary rates are adjusted according to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, *et. seq.*

Each of the respondents was permanently promoted on various dates from August, 1973 through October, 1974 from a Wage Board position with an hourly rate salary to a General Schedule position with a per annum salary rate. Each respondent was promoted following application, selection, and appointment under the Department of the Navy Merit Promotion Program.

At the time of the effective date of promotion for respondent, Nicholas J. Libretto, his salary slotting in his General Schedule position was computed based on his highest previous rate in the Wage Board rate structure. The remaining five respondents had their new salary rates computed on the basis of a two-step increase at the time of promotion.

In November, 1974, respondent, Nicholas J. Libretto, filed an appeal with the Civilian Personnel Office of the Navy regarding his pay slotting after his promotion to the General Schedule. The Civilian Personnel Office of the Navy advised Mr. Libretto that since the method of salary slotting used in his case resulted in a discrepancy between his rate of pay upon promotion and that of the other similarly situated respondents that a formal written decision would be sought from the Office of Civilian Manpower Management, Department of the Navy. On March 19, 1975, the Director of Civilian Manpower Management, Department of the Navy, affirmed the salary slotting accorded respondent Libretto, and announced that the salary slotting of the other respondents had been incorrectly set and would thereafter be adjusted downward in accordance with the salary slotting procedures applied to respondent Libretto.

After exhausting their administrative remedies, respondents petitioned the United States Court of Claims

to correct their salary slotting after promotion from the Wage Board to General Schedule positions in order to reflect a two-step increase upon promotion. Following full briefing and oral argument of Cross Motions for Summary Judgment, the Court of Claims found for respondents, holding:

> ". . . that 5 U.S.C. 5334(b) requires that a GS (General Schedule) employee who has been promoted from the WS (Wage System) is entitled to two-step increases." (explanation supplied).

The decision of the United States Court of Claims below turned on the meaning of 5 U.S.C. 5334 and various regulations contained in 5 CFR, Part 531. The Court of Claims found that it was undisputed that respondents received a promotion. The Court of Claims reviewed legislative history of 5 U.S.C. 5334 and concluded that Congress intended that a promotion meant additional compensation of at least a certain amount. The Court then noted that applying the "highest previous rate" pay slotting upon promotion, as urged by the government, would in some instances leave a promoted employee with *no* additional pay. After careful consideration of all the parties' submissions and oral argument, the Court of Claims granted respondents' Motion for Summary Judgment and ordered that respondents should receive back salary for improper pay slotting.

By motion dated June 19, 1979, petitioner moved for a Rehearing *En Banc* of the May 16, 1979 decision of the Court of Claims. By order dated September 28, 1979, the Court of Claims denied petitioner's Motion for Rehearing *En Banc*.

Although respondents' Motion for Call Upon the General Accounting Office to calculate their back salary

entitlement was allowed November 7, 1979, the report of such back salary entitlement was not filed in the Court of Claims until June 13, 1980. Respondents' back salary entitlement was calculated for the period from the effective date of the then promotion in issue to May 17, 1980.

REASONS FOR DENYING THE PETITION

Petitioner contends that the United States Court of Claims has misinterpreted or misapplied the provisions of 5 U.S.C. 5334(b), and that such alleged error will impose substantial monetary liability on the United States. The arguments advanced by petitioner in support of its petition are the same arguments made to the Court of Claims and rejected by the Court in its decision below. Petitioner is simply seeking another hearing of its same arguments, a purpose for which the Writ of Certiorari is not applicable. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

For purposes of review of the findings of the Court of Claims, such findings are treated like the "verdict of a jury and this Court is not at liberty to refer to the evidence any more than to the opinion for the purpose of eking out, controlling, or modifying their scope". *United States* v. *Esnault Pelteric*, 303 U.S. 26, 29 (1938); *United States* v. *Causby*, 328 U.S. 256, 268 (1946); and *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976).

1. Petitioner Has Not Demonstrated a Substantial Federal Question.

The Petition for Writ of Certiorari should be denied. The question involved is not one of peculiar gravity and general importance. *Fields* v. *United States*, 205 U.S. 292, 296 (1907); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S.

251, 258 (1916); *Brown* v. *Allen*, 344 U.S. 443, 447 (1953). Petitioner has failed to provide any substantiation whatsoever for its contention that the Court of Claims decision will impose a substantial monetary liability on the United States. The Petition is simply speculative as to any back pay claims which may be initiated by the decision below.

In support of its petition, petitioner has merely presented estimates of the number of claims before the General Accounting Office without any corroboration whatsoever that such claims are valid or are based on the decision of the Court of Claims below.

The number of claims which petitioner alleges will result from the decision below includes claims which are based on promotions which took place over six years ago.

Petitioner appears to argue that employees may have a claim for back salary in instances of promotion occurring many years ago. Such claim would be an exception to the six year limitation period of the United States Court of Claims. 28 U.S.C. 2501. This is the first recognition by the government, of which counsel is aware, that there is a continuing claim exception to the Statute of Limitations for promotions which occurred six years prior to filing suit. Petitioner appears to be raising exaggerated concerns over the ramifications of the decision of the Court of Claims below on the operation and expenses of the United States government.

Petitioner's estimate of the recovery of back salary by the six respondents fails to note that the amount of recovery was increased as a result of the one year delay from the Court's decision to the rendition of a money judgment. This delay was occasioned by the length of time spent by the General Accounting Office and the Office of Personnel Management in calculating respondents' back

salary entitlement. Petitioner's liability in the instant matter would have been considerably reduced by prompt response to respondents' Motion for Call.

Petitioner cannot estimate potential monetary liability arising from the decision below by projecting the back salary recovery of respondents, unless it can be assumed that the delay in processing future claims will be comparable to the one year delay in calculating respondents' back salary entitlement after the decision below. The Supreme Court does not "sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants". *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).

As petitioner pointed out in its brief, under the provisions of the Tucker Act, 28 U.S.C. 1346, 1491, suits involving pay slotting claims, pursuant to 5 U.S.C. 5334, are exclusively within the jurisdiction of the United States Court of Claims. There is, therefore, no conflict of opinion between the Circuit Courts of Appeal or lower courts and the Court of Claims on the question here.

Petitioner has not demonstrated that there is any conflict of opinion between the lower courts or that there is a substantial federal question beyond petitioner's speculations. Petitioner is merely dissatisfied with the decision of the Court of Claims below and seeks another hearing of its arguments.

2. The Decision Below is Correct

The decision of the Court of Claims below is correct. Petitioner raises questions of the competence of the Court in deciding this matter of civilian pay and proper pay slotting upon promotion. This issue of proper pay slotting is

one which the Court of Claims is uniquely qualified to decide.

As the Court of Claims noted in its opinion below, the issue is not whether respondents were promoted. The promotion of respondents was an accomplished fact. This case is not a matter of an employee requesting a promotion. No discretion of the Court is required. The issue is proper pay salary slotting upon promotion. *Kellerman* v. *United States,* 504 F.2d 1128, 1132, 205 Ct. Cl. 484, 490 (1974); *Nordstrom* v. *United States,* 177 Ct. Cl. 818 (1966). Each of the respondents was seeking an automatic pay adjustment following the promotion process.

Petitioner's brief reargues the same points advanced before the Court of Claims and rejected. Petitioner contends that the proper pay slotting upon promotion from the Wage Board to a General Schedule position is determined by applying the "highest previous rate". The so-called "highest previous rate" rule advanced by petitioner as applicable to the instant matter, is nothing more than a mere conversion from one salary rate to another. According to the highest previous rate rule a higher pay rate after "promotion" might occur, but only when employees' Wage Board salary fell between two General Schedule rates (steps). In practice, the highest previous rate pay slotting urged by petitioner as appropriate here would result in only a few cents per hour increase in pay for these respondents, after they were promoted from Wage Board to General Schedule positions. And, some of the respondents were actually promoted from non-supervisory to supervisory positions.

In support of its position, petitioner has argued that the highest previous rate has been the "longstanding and consistent interpretation of the statute by the agencies respon-

sible for its administration". Such argument is refuted by the facts of the case. As the Court of Claims noted in its opinion below:

> "Just how incredibly confusing the regulations were is certainly obvious, since the government paid five claimants, then changed its mind, then refused to pay another, reneged on the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim." (Pet. App. 5a, note 7).

Clearly, uniformity in administrative processing was the exception rather than the rule.

As to the decisions of the Comptroller General, the Court is not bound by the view of the Comptroller General, since such decisions do not operate as a legal or judicial determination of the rights of the parties. *Burroughs Corporation* v. *United States,* Ct. Cl. No. 251-78 (March 19, 1980), Slip Op. at page 8.

Administrative construction of a statute can prevail only if such construction is reasonable. *Robinson* v. *Lundrigan,* 227 U.S. 173, 178 (1973). The Courts are not obligated to stand aside and rubberstamp affirmance of the administrative decisions which they deem inconsistent with a statutory mandate or which frustrate the congressional policy underlying a statute. *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973). The principal of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible to differing interpretations. *Shea* v. *Vialpando,* 416 U.S. 251, 262, note 11 (1974).

The statute in question is clear on its face and provides that a "promotion" entitles respondents to a two-step in-

crease [5 U.S.C. 5334(b)]. It is equally clear and undisputed that respondents have been "promoted". In its decision, the Court of Claims followed the plain meaning of 5 U.S.C. 5334(b), and held that respondents are entitled to a two-step increase upon promotion. *Allstate Insurance Co.* v. *United States,* 550 F.2d 629, 213 Ct. Cl. 96 (1977). Where regulations are inconsistent with the statute, such regulations cannot, to that extent, stand. *Farrell Lines, Inc.* v. *United States,* 499 F.2d 587, 204 Ct. Cl. 482 (1974). The regulations cited by petitioner are inconsistent with the statute [5 U.S.C. 5334(b)] and are not dispositive of the matter in issue.

In support of its petition, petitioner argues that Congress intended that 5 U.S.C. 5334(b) was only to provide for a two-step increase for a promotion from one General Schedule position to another General Schedule position. The statements of Congressmen and others testifying at House hearings, as cited by petitioner, do not provide support for petitioner's position. It is clear that Congress did not intend 5 U.S.C. 5334(b) to apply to promotions from one Wage Board position to another Wage Board position. There is, however, no indication whatsoever that Congress intended to exclude promotions from the Wage Board to a General Schedule position from the operation of 5 U.S.C. 5334(b), as petitioner suggests.

In any event, where the statute is plain on its face, such as here, statements in committee reports are not to be considered in interpretation of the statute. *United States* v. *Missouri P.R. Co.,* 278 U.S. 269, 278 (1929).

Petitioner's argument that the term "grade", as such term appears in 5 U.S.C. 5334(b), applies only to General Schedule grades is specious. The statutes and regulations relating to the pay setting of Wage Board positions refers to

"grades" within the Wage Board. Chapter 532 of the Federal Personnel Manual provides regulations for the pay of employees in the Federal Wage System. The term "grade" is used throughout Chapter 532.

The legislative history of 5 U.S.C. 5334(b) does not support petitioner's position that a two-step increase is available only for promotions within the General Schedule. The argument of petitioner fails to address the issue of promotion between wage systems. The 1972 legislation which was to codify and standardize the prevailing rate system was not, as petitioner argues in its brief, an express approval of the pay slotting procedure which petitioner argues.

In 1972, Congress enacted legislation to establish into law the long established principles and policies for setting the pay of prevailing rate employees. Public Law No. 92-392, 86 Stat. 564, was enacted to codify the procedures by which the wages of Wage Board employees were established, monitored and adjusted. Nothing in the legislative history suggests that Congress, in its consideration of Public Law No. 92-392, expressly approved any pay slotting procedure of applying the highest previous rate, which is urged here by petitioner for promotions from Wage Board to General Schedule positions.

The pay slotting procedures of the "highest previous rate" calculation urged by petitioner would be to slot the employee in a General Schedule grade that does not exceed the employee's highest previous rate in the Wage Board. If the employee's previous Wage Board salary falls between two General Schedule pay rates (steps) of the grade to which the employee is assigned, the employee may receive the higher pay rate upon promotion. Thus, the amount of any increase in pay upon promotion would depend on the

disparity between two General Schedule steps. The employee, therefore, could conceivably receive, under petitioner's theory, a minimum of no increase in pay upon promotion and a maximum increase in pay upon promotion of less than a one-step increase. This is the same position which the Court of Claims rejected because it would "in some instances, leave a promoted employee with no additional pay."

At various times, petitioner has argued that the proper pay slotting of employees, pursuant to a promotion, is a two-step increase, one-step increase, and no step increase (highest previous rate). Throughout this case, petitioner has confused this action of *promotion* of an employee with the personnel action of *converting* a position from the Wage Board to the General Schedule. In such situation, as conversion to another pay system, the highest previous rate calculation urged by petitioner may be proper. There, the *position* is converted and the incumbent in the position merely moves with the position and changes pay systems. In the instant matter, however, respondents were *promoted* to different positions in different pay schedules. Their promotions were granted on the basis of merit. Proper slotting to reflect the promotion (and salary increase) had to follow. Pursuant to the plain language of 5 U.S.C. 5334(b), respondents were entitled to a two-step increase upon promotion.

It is well settled that the interpretation of a statute which effectuates rather than frustrates the purpose of the legislation must be heeded. *Shapiro* v. *United States,* 335 U.S. 1, 31 (1948). As the Court of Claims observed in its opinion below, in enacting 5 U.S.C. 5334(b) Congress intended to compensate employees promoted from one position to another for the increase in duties and responsibility. At one point. a one step, and then later a two step, in-

crease in salary was considered by Congress as appropriate recompense for the increased duties and responsibility which a promotion brought. The interpretation of 5 U.S.C. 5334(b) urged by petitioner is that employees promoted from Wage Board positions to positions of greater responsibility in the General Schedule will not be so recompensed.

Petitioner stipulates in its brief that employees promoted *within* the Wage Board or employees promoted from the General Schedule to the Wage Board receive an increase in salary upon promotion of at least one step (Pet. p. 9, note 8). But we are concerned here with promotions from the Wage Board to the General Schedule. Petitioner's argument might conceptually provide no increase in salary upon promotion when the employer's Wage Board salary was equal to the salary of his new General Schedule position. Petitioner's position is inconsistent and not in keeping with the statute and its intent.

The decision of the Court of Claims is correct. Petitioner has not demonstrated in its Petition for Writ of Certiorari that the decision of the Court of Claims below is incorrect or that a substantial federal question is in issue. Petitioner is merely dissatisfied with the decision of the Court of Claims below and is attempting through the Petition for Writ of Certiorari to obtain another hearing of its arguments.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 80-1121

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether 5 U.S.C. 5334(b), which entitles a promoted or transferred government employee to an automatic two-step increase in pay, is applicable to respondents' promotions from positions in the prevailing-rate Wage System (WS) to positions in the General Schedule (GS).

PARTIES TO THE PROCEEDING

The original plaintiffs in this action were Joseph J. Clark, Frank D'Aversa, Nicholas J. Libretto, Nicholas J. Proto, Carlo Scialpi, and Albert Wolfus. Clark and Proto are now deceased; they are represented herein by their widows, Margaret Devine Clark and Annette Kurtzman Proto.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
5 U.S.C. 5334(b), which requires a two-step pay increase for employees "promoted * * * to a position in a higher grade," is inapplicable to changes of position from the Wage System to the General Schedule	10
A. The plain language of the statute demonstrates that Section 5334(b) is applicable only to those promotions that occur within the General Schedule	10
B. The legislative history and purpose of Section 5334(b) confirm that it is limited to promotions within the General Schedule	16
C. The agencies responsible for proposing and administering Section 5334(b) have consistently construed it to apply only to promotions within the General Schedule, and Congress has confirmed the correctness of that construction	23
Conclusion	32

TABLE OF AUTHORITIES

Cases:

Andrus v. *Shell Oil Co.*, 446 U.S. 657	26
Apex Hosiery Co. v. *Leader*, 310 U.S. 469	27
Board of Governors v. *Agnew*, 329 U.S. 441	27
Board of Governors of the Federal Reserve System v. *First Lincolnwood Corp.*, 439 U.S. 234	27

Cases—Continued: Page

Board of Governors of Federal Reserve System v. *Investment Co. Institute*, No. 79-927 (Feb. 24, 1981) 27
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102 11
E. I. duPont de Nemours & Co. v. *Collins*, 432 U.S. 46 25-26
EEOC v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981) 26, 27
FCC v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981) 26
Investment Co. Institute v. *Camp.*, 401 U.S. 617.... 26
Lewis v. *United States*, 445 U.S. 55 11
Miller v. *Youakim*, 440 U.S. 125 26
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 26
Pennington v. *Coxe*, 6 U.S. (2 Cranch) 33 11
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367.... 26, 27
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 27
Udall v. *Tallman*, 380 U.S. 1 26
Unemployment Comm'n v. *Aragon*, 329 U.S. 143.... 26
United States v. *Albernaz*, No. 79-1709 (Mar. 9, 1981) 11
United States v. *American Trucking Associations, Inc.*, 310 U.S. 534 26
United States v. *Clark*, 445 U.S. 23 4
United States v. *Rutherford*, 442 U.S. 544 27
Zenith Radio Corp. v. *United States*, 437 U.S. 443.. 26

Statutes and regulations:

Back Pay Act of 1966, 5 U.S.C. 5596 6
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. III) 1101 *et seq.* 4
Classification Act of 1949, ch. 782, 63 Stat. 954 *et seq.*:
Section 202(7), 5 U.S.C. (1952 ed.) 1082(7).. 24
Section 802, 5 U.S.C. (1952 ed.) 1132 23
Section 802(b), 5 U.S.C. (1952 ed.) 1132(b).. 16, 23
Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 3

Statutes and regulations—Continued: Page

Tucker Act, 28 U.S.C. 1491 6
Pub. L. No. 87-793, Section 604(a), 76 Stat. 847-848, 5 U.S.C. (1964 ed.) 1132(b) 28, 30
Pub. L. No. 92-392, 86 Stat. 564 31
5 U.S.C. 5101(1)(B) 20
5 U.S.C. 5102(a)(5) 3, 9, 12, 20
5 U.S.C. 5102(b) 2
5 U.S.C. 5102(c)(7) 3
5 U.S.C. 5104 2
5 U.S.C. 5106(b) 3
5 U.S.C. (& Supp. III) 5331 *et seq.* 2, 3
5 U.S.C. 5331(a) 12
5 U.S.C. 5332 ..... 2, 3, 21, 22
5 U.S.C. 5334(a) 4, 8, 11, 12, 13, 25, 31
5 U.S.C. 5334(b) ..... *passim*
5 U.S.C. 5335 21
5 U.S.C. 5335(a)(1-3) 22
5 U.S.C. 5338 11
5 U.S.C. (& Supp. III) 5341 *et seq.* 2, 3, 31
5 U.S.C. 5342(a)(2)(A) 3
5 U.S.C. 5343 3
5 U.S.C. 5343(b) 20
5 U.S.C. 5343(c)(2) 22
5 U.S.C. 5343(c)(5) 16, 31
5 U.S.C. 5343(e)(2)(A-C) 22
31 U.S.C. 71 25
31 U.S.C. 72 25
5 C.F.R.:
Section 25.103(b) 24
Section 25.104(a) 24
Section 531.202(a)(2) 14
Section 531.202(h)(1) 14
Section 531.202(h)(2) 7, 12, 13, 14
Section 531.203(c) 4, 5, 8, 11
Section 531.204(a) 24
Section 531.204(a)(1) 8, 24
Section 532.401 15
Section 532.405 15
Section 532.407 ..... 6, 15

Miscellaneous: Page

C. Goodman, *Handbook on Public Personnel Law* (1978) 3
Civilian Manpower Management Instruction 531.S2 (June 26, 1974) 5
50 Comp. Gen. 414 (1970) 14
52 Comp. Gen. 695 (1973) 25
54 Comp. Gen. 435 (1974) 25
58 Comp. Gen. 181 (1978) 12, 25
59 Comp. Gen. 209 (1980) 14, 25
Comp. Gen. decision B-170675 (Oct. 3, 1975) (unpublished) 25
Comp. Gen. opinion B-157649 (Nov. 22, 1965) (unpublished) 25
Comp. Gen. opinion B-172706 (Apr. 19, 1972) (unpublished) 25
Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975) (unpublished) 25
95 Cong. Rec. (1949):
p. 5568 23
p. 13487 22
117 Cong. Rec. (1971):
p. 27674 22
p. 27681 22
p. 27684 22
p. 27685 22
CSC Federal Personnel Manual System (FPM), *Federal Wage System*:
Supplement 532-1, Subchapter S8-3d (Jan. 16, 1973) 5
Supplement 532-1, Subchapter S8-3d (Apr. 14, 1980) 5-6
15 Fed. Reg. (1950):
p. 1235 24
p. 1236 24
p. 7868 24
25 Fed. Reg. 7147 (1960) 24
28 Fed. Reg. 10948 (1963) 24
33 Fed. Reg. 12450 (1968) 24
46 Fed. Reg. 21343, 21350 (1981) 6, 15

Miscellaneous—Continued: Page

Conversion of Nonappropriated Fund Employees to Competitive Service: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. (1980) 32
Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing Before the House Comm. on Post Office and Civil Service, 86th Cong., 2d Sess. (1960) 18, 28, 29
Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing on H.R. 1010 and H.R. 2015 Before the House Comm. on Post Office and Civil Service, 87th Cong., 1st Sess. (1961) 19, 20, 21, 23, 28, 30
Salaries of Federal Government Employees: Hearings on S. 558, S. 559, S. 1762, S. 1772, S. 1790 and Other Bills Before Subcomm. No. 5 of the Senate Comm. on Post Office and Civil Service, 81st Cong., 1st Sess. (1949) 17, 22-23
H.R. 543, 86th Cong., 1st Sess. (1959) 28
H.R. 1010, 87th Cong., 1st Sess. (1961) 30
H.R. 2015, 87th Cong., 1st Sess. (1961) 30
H.R. Conf. Rep. No. 2525, 87th Cong., 2d Sess. (1962) 29
H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. (1962) 29, 30
H.R. Rep. No. 1264, 81st Cong., 1st Sess. (1949).... 9, 10, 13, 16, 17, 22, 23, 25
H.R. Rep. No. 1981, 86th Cong., 2d Sess. (1960).... 28
H.R. Rep. No. 92-339, 92d Cong., 1st Sess. (1971).. 3, 22, 31
S. Rep. No. 1113, 80th Cong., 2d Sess. (1948).... 17, 19
S. Rep. No. 847, 81st Cong., 1st Sess. (1949)..... 9, 16, 17, 23
S. Rep. No. 2120, 87th Cong., 2d Sess. (1962).... 19-20, 28, 30
S. Rep. No. 92-791, 92d Cong., 2d Sess. (1972).. 3, 22, 31
U.S. Bureau of Census, *Statistical Abstract of the United States: 1980* 2, 3
R. Vaughn, *Principles of Civil Service Law* (1976) 2, 3

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims on the issue of liability (Pet. App. 1a-8a) is reported at 599 F.2d 411. The order of the Court of Claims determining the amount of respondents' recovery (Pet. App. 9a-14a) is unreported.

JURISDICTION

The opinion of the Court of Claims on the issue of liability was rendered on May 16, 1979. A timely petition for rehearing was denied on September 28, 1979 (Pet. App. 15a-16a). The judgment of the Court of Claims awarding monetary recovery to respondents was entered on August 8, 1980 (Pet. App. 9a). On October 28, 1980, the Chief Justice extended

the time for filing a petition for a writ of certiorari to and including January 5, 1981. The petition for a writ of certiorari was filed on that date and was granted on March 23, 1981 (J.A. 71). The jurisdiction of this Court rests upon 28 U.S.C. 1255. See *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to the petition (Pet. App. 17a-22a).

STATEMENT

1. This case involves two of the principal pay systems for federal employees—the General Schedule (GS), 5 U.S.C. (& Supp. III) 5331 *et seq.*, and the prevailing-rate Wage System (WS), 5 U.S.C. (& Supp. III) 5341 *et seq.*

Except as otherwise provided, "all civilian positions and employees in or under an agency" fall within the General Schedule. 5 U.S.C. 5102(b); see also 5 U.S.C. 5331. The General Schedule covers most federal white-collar positions. See R. Vaughn, *Principles of Civil Service Law* § 6.2(a), at 6-4 (1976). There are approximately 1.4 million full-time employees in the General Schedule. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1980*, at 283, Table No. 474 (1980) ("1980 Statistical Abstract").

The General Schedule comprises 18 grades. See 5 U.S.C. 5104 and 5332. A grade

> includes all classes of positions which, although different with respect to kind or subject-matter of work, are sufficiently equivalent as to—
>
> (A) level of difficulty and responsibility; and

(B) level of qualification requirements of the work;

to warrant their inclusion within one range of rates of basic pay in the General Schedule.

5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5106(b). In turn, each grade is divided into rates of pay, or steps. See 5 U.S.C. 5332. GS salaries are determined pursuant to the principles of comparability set forth in the Federal Pay Comparability Act of 1970. See 5 U.S.C. 5301. The salary level for a given GS grade and step is uniform nationwide. See 5 U.S.C. 5332.

In contrast to the General Schedule, the Wage System is applicable to federal blue-collar workers. See 5 U.S.C. 5342(a)(2)(A); C. Goodman, *Handbook on Public Personnel Law* 147 (1978); Vaughn, *supra*, § 6.2(b), at 6-17.[1] By definition, WS positions are excluded from the General Schedule. See 5 U.S.C. 5102(c)(7), 5331, 5342(a)(2)(A). The Wage System encompasses approximately 456,000 full-time employees. See 1980 Statistical Abstract, *supra*, at 283, Table No. 474. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the local wage area. See 5 U.S.C. 5341, 5343. Thus, unlike the General Schedule, WS rates are determined for each locality and vary across the country.[2]

2. Respondents are six present and former employees of the Supervisor of Shipbuilding, Conversion

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[1] Wage System employees are generally laborers, craftsmen, and tradesmen, such as truck drivers, welders, aircraft mechanics, carpenters, tool and diemakers, electricians, and plumbers. Approximately 80% of WS employees work for the Department of Defense. See H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971); S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972).

[2] The history of the Wage System is discussed in Vaughn, *supra*, § 6.2(b), at 6-18 to 6-20.

and Repair, Department of the Navy. Between July 1973 and October 1974, they were shifted from supervisory positions in the prevailing-rate Wage System to positions under the General Schedule.[3]

Incident to these changes in position, respondents' new salaries were calculated pursuant to the provisions of 5 U.S.C. 5334(a) and the Civil Service Commission (CSC) "highest previous rate" rule, which provides that

> when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate.

5 C.F.R. 531.203(c) (Pet. App. 20a).[4] Each respondent's highest previous rate fell between two steps of his new GS grade and, in accordance with general

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[3] Respondents' changes of position were as follows: Clark, from a WS ship surveyor (shipfitter) to a GS quality assurance specialist (process) (J.A. 37); D'Aversa, from a WS ship surveyor (pipefitter) to a GS production controller (shipbuilding) (J.A. 29, 33); Libretto, from a WS ship surveyor (machinist) to a GS engineering technician (drafting) (J.A. 35); Proto, from a WS ship surveyor (electrician) to a GS production controller (shipbuilding) (J.A. 23) and later to a GS contract negotiator (J.A. 27); Scialpi, from a WS ship surveyor (shipfitter) to a GS contract negotiator (J.A. 15); and Wolfus, from a WS ship surveyor (machinist) to a GS contract negotiator (J.A. 19).

[4] In 1979, the Civil Service Commission was succeeded by the Office of Personnel Management (OPM). See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. III) 1101 *et seq.*; see also *United States* v. *Clark*, 445 U.S. 23, 25 n.1 (1980).

Navy policy,[5] he was given the higher salary level. In this way, respondents received a salary increase upon their appointment to a position in the General Schedule.

Although the "highest previous rate" rule was applied in the case of each respondent, two different methodologies were initially used in making the requisite calculations.[6] After learning of this discrepancy,

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[5] By regulation, the Navy has elected to place employees at the higher of the two GS rates in all cases where it serves the interest of the government. See Civilian Manpower Management Instruction 531.S2 (June 26, 1974).

[6] See J.A. 42-43. With respect to respondent Libretto, the "highest previous rate" rule was correctly applied to his existing WS salary. In contrast, the GS salaries of the other respondents were originally determined by first applying the provision of Subchapter S8-3d of the CSC Federal Personnel Manual System (FPM), *Federal Wage System*, Supplement 532-1 (Inst. 8, Jan. 16, 1973) (Pet. App. 21a-22a), which stated that an employee promoted to a Wage System position is entitled to be paid at the lowest scheduled rate that exceeds his existing rate of pay by no less than a one-step increment of the category from which he was promoted. Once this adjustment had been made, the new GS salaries of these respondents were computed by applying the "highest previous rate" rule of 5 C.F.R. 531.203(c) to the adjusted rates of pay. Thus, each of these respondents was awarded two salary increases for a single change of position. This method of computation was in error, because Subchapter S8-3d and the "highest previous rate" rule of 5 C.F.R. 531.203(c) are not applicable to the same personnel action: Subchapter S8-3d covers promotions to a WS position, while the "highest previous rate" rule pertains to changes from a WS position to a GS position.

We note that Subchapter S8-3d of Supplement 532-1 was recently amended to provide for an increase of 4% of the representative rate of the previous grade instead of a one-step increase. See Federal Personnel Manual System, *Fed-*

respondent Libretto filed an appeal with the Navy in November 1974, claiming that he was entitled to the higher GS salary received by the other respondents (J.A. 47-51). The Navy rejected this contention on the ground that respondent Libretto's GS salary had been properly determined (J.A. 44-45, 52-53). The Navy also concluded that the salaries of the other respondents were erroneous, and accordingly it notified them that their salaries would be reduced to the correct levels based on the formula utilized in the case of respondent Libretto (J.A. 44-45, 54-57; Pet. App. 2a).

Respondents unsuccessfully pursued their administrative remedies (J.A. 58-64), and on January 29, 1976, they commenced this suit in the Court of Claims under the Tucker Act (28 U.S.C. 1491) and the Back Pay Act of 1966 (5 U.S.C. 5596). Challenging the applicability of the "highest previous rate" rule, respondents contended that they were entitled to a two-step increase in pay pursuant to 5 U.S.C. 5334(b), which reads in pertinent part (Pet. App. 19a):

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred.

Respondents sought an award of back pay and a correction of their employment records in accordance

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eral Wage System, Supplement 532-1, Subchapter S8-3d (Inst. 17, Apr. 14, 1980); see also 46 Fed. Reg. 21343, 21350 (1981) (to be codified in 5 C.F.R. 532.407). This amendment does not affect the question presented in this case.

with Section 5334(b).[7] The government opposed respondents' claims on the ground that Section 5334(b) applies only to promotions within the General Schedule and therefore did not extend to respondents' shift between the Wage System and the General Schedule.

On cross-motions for summary judgment, the Court of Claims held (Pet. App. 1a-8a) that 5 U.S.C. 5334(b) is applicable to promotions from a position within the Wage System to a position under the General Schedule. Focusing on the word "promoted" in the statute (Pet. App. 4a-5a), and emphasizing that respondents had been "promoted" within the meaning of 5 C.F.R. 531.202(h)(2) (Pet. App. 4a & n.5), the court found that respondents were entitled to a two-step salary increase under Section 5334(b). In addition, relying on the fact that a promotion within the GS system gives rise to a two-step increase, and believing that "[a]n employee promoted within the WS receives a comparable benefit; even an employee promoted 'criss-cross' from GS to WS receives the benefit" (Pet. App. 7a), the court concluded that Congress must have intended a like rule to apply to promotions from the Wage System to the Gen-

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[7] On its face, 5 U.S.C. 5334(b) entitles the employee to a GS salary that "exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Thus, the Court of Claims clearly misunderstood the operation of Section 5334(b) when it stated (Pet. App. 1a n.1) that the statutory increase was measured by two steps of the new grade to which the employee was promoted rather than of the former grade from which he was promoted. The amount of recovery for each respondent specified in the final judgment, which was based on a stipulation between the parties (Pet. App. 9a-14a), reflects the correct computation under Section 5334(b).

eral Schedule (*id.* at 8a). Accordingly, the court invalidated, as inconsistent with the statute, the OPM regulation that construed Section 5334(b) to be limited to transfers or promotions within the General Schedule:

> The requirements of section 5334(b) of title 5, United States Code, apply only (i) to a transfer from one General Schedule position to a higher General Schedule position, and (ii) to a promotion from one General Schedule grade to a higher General Schedule grade.

5 C.F.R. 531.204(a)(1) (Pet. App. 20a).

Based on this decision, the case was remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. The government's motion for rehearing on the issue of liability was denied (Pet. App. 15a-16a). Thereafter, the parties stipulated to the amount of respondents' recovery, and final judgment was entered on August 8, 1980 (*id.* at 9a-14a).

SUMMARY OF ARGUMENT

The Court of Claims' holding that all employees promoted from the prevailing-rate Wage System to the General Schedule are entitled to a two-step increase in pay is inconsistent with the plain language of the relevant statute. 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management * * *." Respondents' salaries were thus subject to the "highest previous rate" rule set forth in 5 C.F.R. 531.203(c).

OPM's express authority to fix the rate of pay of employees in respondents' situation was not superseded by the limited exception contained in 5 U.S.C.

5334(b). Section 5334(b) provides that "an employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Since the word "grade" is defined in terms of "classes of positions * * * inclu[ded] within one range of rates of basic pay *in the General Schedule*" (5 U.S.C. 5102(a)(5) (emphasis added)), the applicability of Section 5334(b) is explicitly confined to promotions within the General Schedule and does not extend to respondents' change of position from the Wage System to the General Schedule.

The legislative history and purpose of Section 5334(b) confirm that the statute is restricted to promotions within the General Schedule. Because of the overlap in salary scales for consecutive GS grades, the upper salary levels in any given grade exceed the beginning levels in the next higher grade. Hence, a promotion in grade would not necessarily result in a pay raise even though the new position entailed a higher "level of difficulty * * *[,] responsibility[,] and * * * qualification requirements * * *" (5 U.S.C. 5102(a)(5)). Section 5334(b) was designed to ensure that "a promotion in duties and responsibilities" would be accompanied by "a promotion in pay." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949); S. Rep. No. 847, 81st Cong., 1st Sess. 38 (1949).

These considerations have no bearing in the case of a change of position between the Wage System and the General Schedule. First, because the Wage System involves an entirely separate pay structure based on periodic reviews of prevailing rates in the locality, there is no necessary overlap between WS

and GS salaries. Second, unlike a change of position within the General Schedule, a change from the Wage System to the General Schedule does not invariably reflect a "promotion" in the customary sense of advancement to "greater responsibilities or more difficult duties" (H.R. Rep. No. 1264, *supra*, at 12). Third, while the absence of an automatic salary increase might seriously discourage GS employees from moving to higher grades, there exist a number of other incentives for a WS employee to accept a GS position. Accordingly, it was unnecessary for Congress to provide an automatic pay increase for WS employees who shift into the General Schedule.

Finally, the Court of Claims' construction of Section 5334(b) is contrary to the interpretation that the agencies responsible for proposing and administering the statute have consistently followed since the time of enactment. On several occasions this interpretation has been brought to the attention of Congress, which has confirmed the correctness of the agencies' position.

ARGUMENT

5 U.S.C. 5334(b), WHICH REQUIRES A TWO-STEP PAY INCREASE FOR EMPLOYEES "PROMOTED * * * TO A POSITION IN A HIGHER GRADE," IS INAPPLICABLE TO CHANGES OF POSITION FROM THE WAGE SYSTEM TO THE GENERAL SCHEDULE

A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Is Applicable Only To Those Promotions That Occur Within The General Schedule

This Court has repeatedly emphasized that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that lan-

guage must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also, *e.g.*, *United States* v. *Albernaz*, No. 79-1709 (Mar. 9, 1981), slip op. 3; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). "That a law is the best expositor of itself * * * [is] among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." *Pennington* v. *Coxe*, 6 U.S. (2 Cranch) 33, 52-53 (1804) (Marshall, C.J.).

Here, the language of the statute clearly indicates that a two-step salary increase is not required for changes of position from the Wage System to the General Schedule. By its terms, 5 U.S.C. 5334(a) provides that, in the circumstances of this case, "[t]he rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission] in conformity with this subchapter and chapter 51 of this title * * *" (Pet. App. 18a).[8] Pursuant to this provision and 5 U.S.C. 5338, the Civil Service Commission promulgated the "highest previous rate" rule, 5 C.F.R. 531.203(c), to determine the new rate of pay "when an employee is reemployed, transferred, reassigned, promoted, or demoted" in the General Schedule (Pet. App. 20a). Under this rule, the Navy was authorized to pay each respondent "any rate of the grade which does not exceed his or her highest previous rate; however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate" (*ibid.*). Thus, the

[8] The Court of Claims agreed (Pet. App. 3a n.4) that 5 U.S.C. 5334(a) is applicable to respondents' promotion from the Wage System to the General Schedule.

General Schedule salary of each respondent was properly computed to be the higher of the two GS rates between which his highest previous rate fell.[9]

Contrary to the analysis of the Court of Claims, OPM's express authority under Section 5334(a) to set standards governing GS rates of pay is not superseded here by the limited exception contained in 5 U.S.C. 5334(b). Section 5334(b) provides (Pet. App. 19a) that "[a]n employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases *of the grade from which he is promoted or transferred*" (emphasis added). Under 5 U.S.C. 5102(a)(5) and 5 U.S.C. 5331(a), the word "grade" is defined to include (Pet. App. 17a) "all classes of positions which * * * are sufficiently equivalent * * * to warrant their inclusion within one range of rates of basic pay *in the General Schedule*" (emphasis added). See also 58 Comp. Gen. 181, 182 (1978). Hence, Section 5334(b) is explicitly confined to promotions from one GS position or grade to another and is inapplicable to promotions, as in the present case, from the Wage System to the General Schedule.

The Court of Claims' construction of 5 U.S.C. 5334(b) rests principally (Pet. App. 4a-8a) on the word "promoted" in the statute and the fact that respondents received a "promotion" under 5 C.F.R. 531.202(h)(2) (Pet. App. 19a-20a) in changing from WS to GS positions. This analysis is incorrect for

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[9] Respondents have never challenged the particular calculations made under the "highest previous rate" rule, but rather have contended only that the rule is not applicable in this case at all.

several reasons. First, as discussed above, the salient inquiry under Section 5334(b) is not whether an employee was promoted, but whether the promotion occurred between GS positions or grades. Thus, insofar as relevant here, a promotion is a necessary but not a sufficient condition for an automatic two-step increase. By narrowly focusing on only one portion of the statute, the court distorted the manifest meaning of Section 5334(b).

In addition, as the Court of Claims appeared to recognize (Pet. App. 3a & n.4), Section 5334(a) is itself applicable to promotions.[10] Hence, the existence of a promotion *vel non* cannot serve to distinguish the applicability of Sections 5334(a) and 5334(b). Instead, the critical distinction is whether the promotion was within the General Schedule.

Moreover, contrary to the approach of the Court of Claims, the characterization of the personnel actions in this case as promotions is the conclusion rather than the starting point of analysis. 5 C.F.R. 531.202(h)(2), upon which the Court of Claims relied (Pet. App. 4a & n.5), provides in pertinent part that a "'[p]romotion' means a change of an employee, while continuously employed, from * * * [a] lower rate paid under * * * [a non-GS system] *to a higher rate* within a General Schedule grade" (*id.* at 19a-20a; emphasis added). Accordingly, respondents nominally were "promoted" only because appli-

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[10] As explained in the legislative history of the statute, 5 U.S.C. 5334(a) "authorizes the Commission to issue regulations governing the rate of basic compensation which an employee may be paid on transfer, *promotion*, demotion, reinstatement, reemployment, or other personnel change." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949) (emphasis added).

cation of the "highest previous rate" rule resulted in an increase in their basic rates of pay.[11] Since a "promotion" thus turns on the level of the GS salary that is ultimately set, it is simply illogical to seek to apply Section 5334(b) to determine that salary in the first instance, as the court below did, based on the existence of a "promotion."[12]

Indeed, it is especially anomalous to find, as in this case, that an automatic two-step increase is required solely because the government exercised its discretion to allow an initial increase under the "highest previous rate" rule and thereby gave respondents a "promotion." See also 59 Comp. Gen. 209, 212 (1980); 50 Comp. Gen. 414, 417 (1970). If the Navy had elected not to afford each of the respondents the higher GS rate, their changes of position would have involved reductions in pay and thus been designated as "demotions" under 5 C.F.R. 531.202(a)(2). In those circumstances, there would be no basis whatever for the Court of Claims' conclusion that respondents are entitled to an automatic salary in-

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[11] On the other hand, a "promotion" within the General Schedule is defined to be "a change of an employee, while continuously employed, from * * * [o]ne General Schedule grade to a higher General Schedule grade." 5 U.S.C. 531.202(h)(1) (Pet. App. 19a-20a). Unlike Section 531.202(h)(2), this provision does not depend on the new rate of pay and therefore can be used to ascertain the applicability of 5 U.S.C. 5334(b) to a personnel change within the General Schedule.

[12] Furthermore, as will be discussed below (see pages 20-21, *infra*), a change of position from the Wage System to the General Schedule, in contrast to a change within the General Schedule, does not necessarily entail a "promotion" in terms of a higher level of difficulty, responsibility, or qualifications.

crease as "promoted" employees. Hence, the decision below rests entirely on the fact that the government chose to grant respondents a higher salary pursuant to the "highest previous rate" rule.

For these reasons, the plain language of the statute demonstrates that 5 U.S.C. 5334(b) is applicable only to promotions within the General Schedule, and the Court of Claims thus erred in applying Section 5334(b) to respondents' changes of position from the Wage System to the General Schedule.[13]

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[13] In addition, the Court of Claims erred in stating (Pet. App. 7a & n.13) that the government conceded that an employee promoted within the Wage System or from the General Schedule to the Wage System is entitled to an increase "comparable" to the two-step increase provided by Section 5334(b) for an employee promoted within the General Schedule. In those contexts, a "promotion" is defined in terms of a change of position to a higher level within the same type wage schedule regardless of the resulting increase or decrease in actual pay for the individual employee (because of the local variation in WS rates), or a change to a position with a higher *representative* rate in a different pay schedule regardless of the increase or decrease in the actual pay of the individual employee. FPM Supplement 532-1, Subchapter S8-2a(7) (Apr. 14, 1980) (Pet. App. 20a-21a). As the government explained in its cross-motion for summary judgment (page 11) and in its petition for rehearing en banc (pages 4-5), an employee promoted either within the Wage System or from the General Schedule to the Wage System receives a one-step increase pursuant to Subchapter S8-2a(7) and S8-3d of FPM Supplement 532-1 (Pet. App. 20a-22a; see also page 5 note 6, *supra*); an employee who is transferred or reassigned but not promoted within the meaning of Subchapter S8-2a(7) may receive an increase only in accordance with the "highest previous rate" rule of Subchapter S8-3c (Pet. App. 21a). See also 46 Fed. Reg. 21343, 21350 (1981) (to be codified in 5 C.F.R. 532.401, 532.405, 532.407). Moreover, these increases are not required by stat-

B. The Legislative History And Purpose Of Section 5334(b) Confirm That It Is Limited To Promotions Within The General Schedule

The legislative history of 5 U.S.C. 5334(b) reveals that it was intended to address a narrow and specific problem relating to promotions within the General Schedule. In light of this history, Section 5334(b) should be construed, consistent with its plain language, to be inapplicable to promotions from the Wage System to the General Schedule.

The provision for an automatic salary increase now found in 5 U.S.C. 5334(b) was originally enacted in the Classification Act of 1949, ch. 782, Section 802(b), 63 Stat. 969-970, 5 U.S.C. (1952 ed.) 1132(b).[14] The congressional reports accompanying this provision explained that, "[a]t present, a promoted employee receives no immediate increase [under the 'highest previous rate' rule] if he is already receiving a rate *in the lower grade* that also occurs in the higher grade. * * * In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. * * * Subsection (b) of section 802 corrects this situation." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12-13 (1949) (emphasis added); S. Rep. No. 847, 81st Cong., 1st Sess. 38 (1949) (emphasis added).[15]

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ute, but instead have been established by OPM in the exercise of its discretion under 5 U.S.C. 5343(c)(5). Thus, the court's discussion in this regard reflects a fundamental misunderstanding of the Wage System.

[14] This section initially provided for a one-step salary increase, but it was amended in 1962 to specify a two-step increase. See page 28, *infra*.

[15] This explanation was taken verbatim from a statement submitted by the Civil Service Commission in support of

The underlying cause of this problem was the overlap in salary scales for consecutive GS grades. Thus, the upper salary levels in any given grade were above the beginning levels in the next higher grade.[16] Accordingly, a promotion in grade would not necessarily result in a pay raise for the employee. To rectify this problem, Congress added the provision for an automatic salary increase to ensure that "a promotion in pay" would be incident to "a promotion in duties and responsibilities." H.R. Rep. No. 1264, *supra*, at 12; S. Rep. No. 847, *supra*, at 38.

The background and purpose of the provision for an automatic salary increase are most clearly explained in the legislative history of the 1962 amendment to the statute.[17] As a representative of the Civil Service Commission stated:

> [T]he Classification Act * * * requires that in a promotion from one grade to another, a person shall be advanced in salary not less than and not more than the equivalent of one pay step in the grade from which he is being promoted. At the time this was drawn in the Classification Act of 1949, this was a little bit of an advance over what existed before that time.
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> The point is that so many people will have served several years in a particular grade and

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the legislation. See *Salaries of Federal Government Employees: Hearings on S. 558, S. 559, S. 1762, S. 1772, S. 1790 and Other Bills Before Subcomm. No. 5 of the Senate Comm. on Post Office and Civil Service*, 81st Cong., 1st Sess. 35, 45 (1949) (hereinafter "*1949 Senate Hearings*").

[16] See *1949 Senate Hearings*, *supra*, at 108-109, 149-150 (1949). See also S. Rep. No. 1113, 80th Cong., 2d Sess. 4 (1948).

[17] See page 16 note 14, *supra*.

> reach a pay step which, because of the way the grade structure is set up, will be very close to or may even overlap the entrance step of the next higher grade. If this employee served long enough in that lower grade, he actually could be getting a salary that is almost at or even above the entrance salary of the higher grade. Therefore, the 1949 act had this provision that he should have the equivalent of at least one step when he is promoted from one grade to the other grade.

Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing Before the House Comm. on Post Office and Civil Service, 86th Cong., 2d Sess. 12-13 (1960) (statement of O. Glenn Stahl) (hereinafter "*1960 House Hearings*"). This explanation was again presented by the Commission in a subsequent congressional hearing on the 1962 legislation:

> Under the Classification Act of 1949, which is the act as it now stands, it had been provided that when an employee was at any particular rate, within a range of rates, for his grade and was then promoted to the next grade, he was entitled, upon being promoted, to go to a rate in the next grade that was at least as high as the amount of a step increase within his old grade. This was necessary because the rate ranges in the grades overlapped.
>
> Of necessity, you cannot have a broad rate range for a grade—so that people can progress within their grade in salary—without its overlapping the next rate range or the next grade a little bit at least. Otherwise, you would have to have very wide differentials between grades. That provision was in there to make the promotion somewhat meaningful.

Formula for Guaranteeing a Minimum Increase When an Employee Is Promoted: Hearing on H.R. 1010 and H.R. 2015 Before the House Comm. on Post Office and Civil Service, 87th Cong., 1st Sess. 6-7 (1961) (statement of Mr. Stahl) (hereinafter "*1961 House Hearings*"). See also *id.* at 13 (statement of Vaux Owen, National Federation of Federal Employees).[18]

The considerations giving rise to the provision for an automatic salary increase have no bearing in the case of a change of position between the Wage System and the General Schedule. First, because the Wage System involves an entirely separate pay structure based on prevailing rates in the local wage areas, there is no necessary overlap between WS and GS salaries. Indeed, since WS rates vary across the country, the relationship between WS and GS salaries will depend on the locality in which the WS worker is employed; thus, for different employees, an identical change from a given WS position to a given GS position could entail a greater salary, a lesser salary, or the same salary. Likewise, this relationship will vary over time as WS "rates * * * move freely with * * * prevailing rates in industry." S. Rep. No. 2120,

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[18] These statements echo the observations in a congressional report on a predecessor bill to the Classification Act of 1949:

> Moreover, when employees are promoted by being assigned to work of greater difficulty or responsibility, they may, because they are already receiving a rate in their present grade which corresponds to a standard rate in a higher grade, be promoted without any immediate change in rate of pay. It would be better if some increase in pay could be made simultaneously with permanent reassignment to more difficult or more responsible work in a higher grade.

S. Rep. No. 1113, 80th Cong., 2d Sess. 4 (1948).

87th Cong., 2d Sess. 5 (1962).[19] In these circumstances, there was no reason for Congress to require an automatic pay increase for every WS employee who is promoted into the General Schedule.

Furthermore, a change from the Wage System to the General Schedule, unlike a change of position within the General Schedule, does not invariably entail a "promotion" in the customary sense of increased duties or enhanced ability. With respect to the General Schedule, a "grade" is defined to "include[] all classes of positions which * * * are sufficiently equivalent as to (A) level of difficulty and responsibility[,] and (B) level of qualification requirements of the work[,] to warrant their inclusion within one range of rates of basic pay in the General Schedule." 5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5101(1)(B). By definition, therefore, a change from one GS grade to a higher GS grade inherently involves an advancement. In contrast, no similar relationship exists for a change from the Wage System to the General Schedule. Nor can a general comparison be drawn between the responsibilities and qualifications of a blue-collar WS position and those of a white-collar GS position. Hence, because the movement of employees from the Wage System to the General Schedule does not implicate the policy that "a promotion in duties and

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[19] See also *1961 House Hearings, supra*, at 16 (statement of O. Glenn Stahl):

> [For] blue collar workers * * * [,] wages are set in accordance with prevailing rates of pay in a given locality and * * * pay adjustments are made at least annually and are very promptly and pretty accurately responsive to economic shifts that take place in pay in private industry.

Full-scale wage surveys are now conducted every two years, with interim surveys held between the full reviews. 5 U.S.C. 5343(b).

responsibilities" should be accompanied by "a promotion in pay" (see page 17, *supra*), such personnel actions fall outside the scope of Section 5334(b) and do not call for an automatic salary increase.

Finally, absent the provision for an automatic salary increase, GS employees might be seriously discouraged from accepting the greater responsibilities and more demanding duties of the position in the higher grade. Indeed, because the General Schedule affords periodic salary increases within each grade (5 U.S.C. 5335), the lack of an automatic salary increase upon a promotion would mean that an employee could receive a larger pay raise by remaining in grade for an additional period than by moving to the next grade. See *1961 House Hearings, supra*, at 7 (statement of O. Glenn Stahl), 12 (statement of John McCart, American Federation of Government Employees). Such disincentives do not obtain in the case of a change in position between the Wage System and the General Schedule. Entirely apart from salary, there are a number of considerations that could encourage this change by a WS employee—for example, the enhanced prestige of a white-collar job, better working conditions, and a greater opportunity for future advancement. Moreover, even without an *automatic* two-step salary increase,[20] a WS worker might nevertheless anticipate a higher salary in the GS position—for instance, where he has reached the maximum pay rate for his WS job.[21]

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[20] We note that in most cases, as occurred here (see page 5, *supra*), a change of position from the Wage System to the General Schedule will result in an increase in salary under the "highest previous rate" rule.

[21] Unlike the 10 steps or rates of pay in each GS grade (see 5 U.S.C. 5332 (chart)), the Wage System currently

Accordingly, it is unnecessary to apply Section 5334(b) to changes of position from the Wage System to the General Schedule in order to serve the purpose of the statute to encourage General Schedule employees to accept the greater responsibilities and more difficult duties of a higher GS position.[22]

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has only five rates for each position (see 5 U.S.C. 5343 (c)(2)) and before 1972 had only three rates (see H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971); S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972)). In addition, the range of pay in a GS grade is approximately 30% of the base rate, but the range in the Wage System is only approximately 16% (and traditionally was only approximately 8%). See 5 U.S.C. 5332 (chart), 5343(e)(2)(A-C); 117 Cong. Rec. 27674 (1971) (remarks of Rep. Hillis); *id.* at 27685 (remarks of Rep. Brasco). And the periodic step-increases in the Wage System occur considerably more quickly than in the General Schedule (compare 5 U.S.C. 5335(a)(1-3) with 5 U.S.C. 5343(e)(2)(A-C)). As a result, the maximum rate of pay for a position is more often reached, and in a far shorter time, by a WS employee than a GS employee. Therefore, many WS employees find themselves in "'dead end' jobs." 117 Cong. Rec. 27684 (1971) (remarks of Rep. Hanley). In 1971, it was estimated that 90% of federal blue-collar workers had obtained the highest of the available pay steps, and many did so in only two years. *Id.* at 27674 (remarks of Rep. Hillis); *id.* at 27681 (remarks of Rep. Matsunaga); *id.* at 27685 (remarks of Rep. Brasco).

[22] We also note that the legislative record of Section 5334(b) refers on several occasions to the fact that Federal blue-collar workers are covered by the separate Wage System rather than the General Schedule, but at no time was it ever suggested that such employees moving into a GS position would be entitled to an automatic salary increase. See, *e.g.*, H.R. Rep. No. 1264, *supra*, at 3, 6, 21; 95 Cong. Rec. 13487 (1949) (remarks of Rep. Rees); *1949 Senate Hearings*, *supra*, at 1 (statement of Ismar Baruch, Civil Service Commission), 113 (statement of Luther C. Steward, National Federation of Federal Employees), 152 (statement of John

C. The Agencies Responsible For Proposing And Administering Section 5334(b) Have Consistently Construed It To Apply Only To Promotions Within The General Schedule, And Congress Has Confirmed The Correctness Of That Construction

In addition to finding support in the statutory language and legislative history, the construction of 5 U.S.C. 5334(b) to apply only to promotions within the General Schedule represents the contemporaneous and consistent interpretation adopted by the agencies responsible for the formulation and administration of the statute. Moreover, the validity of this construction has been recognized and confirmed by Congress.

As noted above (see page 16 & note 14, *supra*), the provision for an automatic salary increase was originally contained in Section 802(b) of the Classification Act of 1949. The bills that led to the Classification Act, including Section 802, were drafted and submitted to Congress by the Civil Service Commission. See S. Rep. No. 847, 81st Cong., 1st Sess. 1, 38 (1949); 95 Cong. Rec. 5568 (1949) (remarks of Sen. Long). As adopted, the Act, and particularly the title containing Section 802, were "entirely in accord with the Commission's views." H.R. Rep. No. 1264, 81st Cong., 1st Sess. 20 (1949); see also *id.* at 4, 19; S. Rep. No. 847, *supra*, at 46.

In first implementing the Act, the Civil Service Commission promulgated regulations providing that "[a]n employee promoted, repromoted or transferred

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G. Yaden, American Federation of Government Employees), 257 (statement of N.P. Alifas, International Association of Machinists), 357 (statement of Orrin A. Bullows, International Brotherhood of Electrical Workers); *1961 House Hearings, supra*, at 16 (statement of O. Glenn Stahl).

to a higher grade *between Classification Act positions*, shall receive * * * [the automatic salary increase]." 5 C.F.R. 25.104(a), 15 Fed. Reg. 1236 (1950) (emphasis added). Unless the promotion or transfer occurred within the Classification Act system, it was subject to the "highest previous rate" rule applicable to "an employee who is reemployed, transferred, reassigned, promoted, repromoted, or demoted * * *" from a different pay system to a position under the Classification Act. See 5 C.F.R. 25.103(b), 15 Fed. Reg. 1235 (1950). Since prevailing-rate positions were excluded from the Classification Act (see ch. 782, Pub. L. No. 429, Section 202(7), 63 Stat. 954-955, 5 U.S.C. (1952 ed.) 1082(7)), an employee transferred or promoted from such a position to a Classification Act position was covered by the "highest previous rate" rule and was not entitled to an automatic step increase in pay.

Subsequent revisions to the regulations have consistently adhered to the construction that the provision for an automatic salary increase is inapplicable to transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position.[23] Likewise, the General Accounting Office,

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[23] See, *e.g.*, 5 C.F.R. 25.104(a), 15 Fed. Reg. 7868 (1950) ("[a]n employee promoted, repromoted or transferred to a higher grade between Classification Act positions or grades"); 5 C.F.R. 25.104(a), 25 Fed. Reg. 7147 (1960) ("[t]he requirements of Section 802(b) of the [Classification] Act apply in repromotion actions and in transfers involving promotions between Classification Act grades"); 5 C.F.R. 531.204(a)(1), 28 Fed. Reg. 10948 (1963) ("[t]he requirements of Section 802(b) of the [A]ct * * * apply in a transfer involving a promotion between Classification Act grades"); 5 C.F.R. 531.204(a), 33 Fed. Reg. 12450 (1968) ("[t]he requirements of Section 5334(b) of title 5, United States

which is authorized to settle and adjust "[a]ll claims and demands whatever * * * against [the Government of the United States]" (31 U.S.C. 71; see also 31 U.S.C. 72),[24] has uniformly recognized that the "highest previous rate" rule, rather than the automatic step-increase provision, governs transfers or promotions from a prevailing-rate position to a Classification Act or General Schedule position. See, *e.g.*, 59 Comp. Gen. 209, 210, 211 (1980); 58 Comp. Gen. 181, 182 (1978); 52 Comp. Gen. 695, 696 (1973); 52 Comp. Gen. 671, 672 (1973); Comp. Gen. decision B-170675 (Oct. 3, 1975) (unpublished); Comp. Gen. opinion B-172706.05 (KM) (Dec. 30, 1975) (unpublished) (J.A. 65-66); Comp. Gen. opinion B-172706 (Apr. 19, 1972) (unpublished) (J.A. 67); Comp. Gen. opinion B-157649 (Nov. 22, 1965) (unpublished).

In disregarding these administrative authorities, the Court of Claims plainly erred by failing to heed the " 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E.I. duPont de Nemours &*

Code, apply only (1) to a transfer from one General Schedule position to a higher General Schedule position, and (2) to a promotion from one General Schedule grade to a higher General Schedule grade").

[24] As Congress noted in connection with the predecessor of Section 5334(a), the regulations to be issued by the Civil Service Commission "would still be subject to decisions of the Comptroller General as to their legality and conformance with the other provisions of the bill." H.R. Rep. No. 1264, *supra*, at 12. See also 54 Comp. Gen. 435, 438 (1974) ("[GAO is] obligated by law to make final determinations regarding the legality of expenditures of appropriated funds").

Co. v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also, *e.g.*, *FCC* v. *WNCN Listeners Guild*, No. 79-824 (Mar. 24, 1981), slip op. 15-16. This principle is particularly appropriate here in light of the "longstanding and consistent administrative interpretation" (*Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) that " 'involves a contemporaneous construction of [the] statute by the [persons] charged with the responsibility of setting its machinery in motion' " (*Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933)). See also, *e.g.*, *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9 n.17). Moreover, "[a]dministrative interpretations are especially persuasive where, as * * * [in this case], the agency participated in developing the provision" (*Miller* v. *Youakim*, 440 U.S. 125, 144 (1979)) and "suggested the provisions' enactment to Congress" (*United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940)).[25]

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[25] Even if there were some room for doubt about the correctness of this longstanding and consistent administrative construction, the agencies' interpretation is a reasonable one that the Court of Claims was bound to respect. " 'To sustain * * * [the agencies'] application of this statutory term, we need not find its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). Rather, "[it] is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). And, in view of the "highly specialized and techni-

In addition, judicial deference to the agencies' interpretation of Section 5334(b) is strongly reinforced by the fact that " 'Congress has refused to alter the administrative construction.' " *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), quoting *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 381. Where, as in this case, "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). Here, "[i]n the [30 years] during which [the CSC and GAO have] consistently allowed * * * [mandatory salary increases only for promotions within the General Schedule], Congress has never expressed its disapproval, and its silence in this regard suggests its consent to [this] practice." *EEOC* v. *Associated Dry Goods Corp.*, *supra*, slip op. 9-10 n.17. And, in examining the statute and its administrative construction, "the views of subsequent Congresses * * * [confirming that construction] are entitled to significant weight." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980).

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cal" nature of the federal personnel system, the agencies' " 'specialized experience gives them an advantage judges cannot possibly have * * * in ascertaining the * * * standards by which they should administer it. Accordingly, their judgment in such matters should be overturned only where there is no reasonable basis to sustain it * * *.' " *Board of Governors of Federal Reserve System* v. *Investment Co. Institute*, No. 79-927 (Feb. 24, 1981), slip op. 9 n.21, quoting *Board of Governors* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring).

As originally passed, the Classification Act required a one-step salary increase for promoted employees (see page 16 & note 14, *supra*). In 1962, the statute was amended to provide for a two-step increase. See Pub. L. No. 87-793, Section 604(a), 76 Stat. 847-848, 5 U.S.C. (1964 ed.) 1132(b). The congressional report on a predecessor bill to provide an automatic two-step salary increase expressly states that "[t]he objective of this bill is to make more realistic and more meaningful promotions *from one grade to a higher grade for employees under the Classification Act.*" H.R. Rep. No. 1981, 86th Cong., 2d Sess. 2 (1960) (emphasis added).[26] The reports on the bill that was later enacted into law reflect the same view. See S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962) ("when an employee is promoted to a position in a higher grade he shall receive basic compensation at the lowest rate of the higher grade which exceeds his existing rate by not less than two-step increases *of the grade from which promoted*") (em-

[26] This bill was identical to the statute that Congress eventually adopted. An earlier version of the bill—H.R. 543, 86th Cong., 1st Sess. (1959)—had provided for an automatic salary increase of the difference between the minimum rates of the new grade and the former grade. See S. Rep. No. 1981, *supra*, at 2. Although the Civil Service Commission "agree[d] with the general objective of the[ ] bill[ ]" (*id.* at 3), it recommended that a two-step increase be substituted (*id.* at 4-5). The bill was amended in accordance with this proposal (*id.* at 1, 2), and in that form the provision for a two-step increase was subsequently enacted with the support of the Commission. See also *1960 House Hearings, supra*, at 2, 13 (statement of O. Glenn Stahl); *1961 House Hearings, supra*, at 2 (statement of Rep. Dulski), 3 (statement of Rep. Lesinski), 7 (statement of O. Glenn Stahl). Although the bills thus differed in the measure of the salary increase, no difference existed in terms of their coverage and applicability.

phasis added); H.R. Conf. Rep. No. 2525, 87th Cong., 2d Sess. 61 (1962) (same); H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962) (same).

The congressional hearings preceding the 1962 legislation also clearly evince the understanding that the automatic salary increase is not applicable to employees promoted from the Wage System to the General Schedule. In considering an initial bill to amend the existing provision for a one-step salary increase (see page 28 note 26, *supra*), Representative Lesinski, the sponsor of the proposal, observed that it "would provide that *an individual covered by the Classification Act who is promoted* to a higher grade be attended by an increase in salary equal to the difference between the minimum rate *of grade from which promoted* and the minimum rate of grade to which promoted." *1960 House Hearings*, *supra*, at 1 (emphasis added). See also *id.* at 29 (statement of Rep. Roosevelt) ("an employee *whose position is subject to the Classification Act* is required to receive upon promotion to a higher grade * * * [an automatic salary increase]") (emphasis added). O. Glenn Stahl of the Civil Service Commission reiterated that the provision for an automatic salary increase applies to "a promotion from one grade to another" (*id.* at 12; see also *id.* at 14) and concerns only those "[e]mployees under the Classification Act" (*id.* at 5; see also *id.* at 8). And, in attempting to estimate the cost of the bill, Mr. Stahl explained that "[y]ou would have to know * * * the precise number of promotions from each grade to the next grade * * *. [Y]ou are dealing with over a million employees under the Classification Act * * *" (*id.* at 15; see also *id.* at 9).

Subsequent hearings on the 1962 amendment further confirm this understanding. Thus, as Chairman Dulski remarked in his opening statement, "[t]hese

bills would provide a formula for guaranteeing employees *under the Classification Act* a minimum salary increase when promoted *from one grade to another*. The purpose of this legislation is to require that, when *a classified employee is promoted*, he will receive an increase in compensation that is more realistic and more commensurate with the increased responsibilities he must assume in the higher grade." *1961 House Hearings, supra*, at 2 (emphasis added).[27] Representative Lesinski, the sponsor of one of the bills, explained that "[u]nder present law, *a classified employee who is promoted or transferred to a higher grade*, in most cases, receives a pay increase equal to at least a one-step increase *in the grade from which promoted.* * * * The simple objective of [the bill] is to make more realistic and more meaningful *promotions from one grade to a higher grade for employees under the Classification Act*" (*id.* at 3; emphasis added). Similarly, O. Glenn Stahl, again testifying on behalf of the Civil Service Commission, noted that the automatic salary increase is "an effort to make promotions from one grade to another * * * a little more meaningful" (*id.* at 6), and he emphasized that "[w]e are speaking now only of employees whose positions are subject to the Classifica-

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[27] The bills under consideration at the hearings—H.R. 1010, 87th Cong., 1st Sess. (1961), and H.R. 2015, 87th Cong., 1st Sess. (1961)—were indistinguishable in scope from the provision enacted into law as Section 604(a). See H.R. Conf. Rep. No. 2532, 87th Cong., 2d Sess. 61 (1962); S. Rep. No. 2120, 87th Cong., 2d Sess. 25 (1962). However, while H.R. 1010, like Section 604(a), called for a two-step increase, H.R. 2015 required that the salary be increased by the difference between the minimum rates of the grades in question. See also *1961 House Hearings, supra*, at 2 (statement of Rep. Dulski), 3 (statement of Rep. Lesinski), 7 (statement of O. Glenn Stahl).

tion Act. * * * [The bill is] limited to the Classification Act. It has no applicability to jobs not under the Classification Act" (*id.* at 6, 10; see also *id.* at 16-18).

In 1972, Congress again considered the pay systems for federal employees when it enacted Pub. L. No. 92-392, 86 Stat. 564, 5 U.S.C. 5341 *et seq.* The purpose of this legislation was to codify and standardize the prevailing-rate system, which had theretofore been governed largely by administrative regulation and practice. See S. Rep. No. 92-791, 92d Cong., 2d Sess. 2 (1972); H.R. Rep. No. 92-339, 92d Cong., 1st Sess. 6 (1971). Comparable to the authority granted by 5 U.S.C. 5334(a) with respect to the General Schedule, the statute authorized the Civil Service Commission to prescribe regulations under the Wage System "governing the administration of pay for individual employees on appointment, transfer, promotion, demotion, and other similar changes in employment status." 5 U.S.C. 5343(c)(5). In adopting this provision, Congress "intended to grant to the Commission the same authority which it now has under 5 United States Code 5334 with respect to employees paid under the General Schedule" (H.R. Rep. No. 92-339, *supra*, at 14). In particular, it was contemplated that "[t]he Commission's regulations [for the Wage System] may cover matters such as * * * application of the highest previous rate rule * * *" (*ibid.*). Thus, Congress expressly approved the "highest previous rate" rule, which the Commission had consistently used for more than 20 years to determine the salary level of an employee transferred or promoted from a prevailing-rate position to a GS position. This specific congressional endorsement of the Commission's practice flatly contradicts the Court of Claims' conclusion that

the provision for an automatic two-step increase, rather than the "highest previous rate" rule, was applicable to respondents' promotions from the Wage System to the General Schedule.[28]

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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[28] OPM has recently reiterated its view to Congress that a "person who has been a Federal employee, although excluded from the General Schedule, would have his or her pay set under the highest previous rate rule upon entry into the General Schedule." *Conversion of Nonappropriated Fund Employees to Competitive Service: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 20 (1980) (statement of Gary R. Nelson, Office of Personnel Management).

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IN THE
Supreme Court of the United States
October Term, 1980

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH J. CLARK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS JOSEPH J. CLARK, ET AL.

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QUESTION PRESENTED

Were respondents entitled, under the specific provisions of 5 U.S.C. 5334(b), to a two step increase in pay by reason of their respective promotions from positions in the prevailing rate Wage System (WS) to higher graded positions in the General Schedule (GS)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

A. Introduction 1

B. The Facts 4

C. The Statutory and Administrative Scheme 6

SUMMARY OF ARGUMENT 10

ARGUMENT 11

A. Respondents Are Entitled To Appropriate Increase In Pay Following Their Promotions 11

B. 5 U.S.C. 5334(b) Is Plain On Its Face That Respondents Are Entitled To A Two Step Increase Upon Promotion 14

C. The Legislative History And Purpose Of Section 5334(b) Was Correctly Expressed By The Court of Claims 17

D. The Administrative Construction Of 5 U.S.C. 5334(b) Has Not Been Consistent 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: **Page**

Biddle v. Commissioner of Internal Revenue,
302 U.S. 573 (1938) 22

Burnet v. Chicago Portrait Co.,
285 U.S. 1 (1932) 22

Caminetti v. United States,
242 U.S. 470 (1917) 14

Case v. Los Angeles Lumber Products Co.,
308 U.S. 106 (1939) 15

Colautti v. Franklin,
439 U.S. 379 (1979) 25

Commissioner v. Acker,
361 U.S. 87 (1959) 22

Dameron v. Brodhead,
345 U.S. 322 (1953) 14

DeGanay v. Lederer,
250 U.S. 376 (1919) 15

Dixon v. United States,
381 U.S. 68 (1965) 22

Ernst and Ernst v. Hochfelder,
425 U.S. 185 (1976) 15

Estate of Sanford v. Commissioner of Internal Revenue, 308 U.S. 39 (1939) 22

Girouard v. United States,
328 U.S. 61 (1946) 21

Helvering v. Powers,
293 U.S. 214 (1934) 22

Page

Helvering v. Sabine Transportation Co.,
318 U.S. 306 (1943) 25

Houghton v. Payne,
194 U.S. 88 (1904) 21

Jarecki v. G.D. Searle & Co.,
367 U.S. 303 (1961) 25

Lapina v. Williams,
232 U.S. 78 (1914) 21

Louisville and Nashville Railroad Company v. United States, 282 U.S. 740 (1931) 22

Leary v. United States,
395 U.S. 6 (1969) 22

McCaughn v. Hershey Chocolate Co.,
283 U.S. 488 (1931) 20

NLRB v. Plasterers' Local Union,
404 U.S. 116 (1971) 20

Peck v. Jenness,
48 U.S. 612 (1849) 24, 25

Penn Mutual Life Insurance Co. v. Lederer,
252 U.S. 523 (1920) 19

Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company,
257 U.S. 563 (1922) 20

Rainwater v. United States,
356 U.S. 590 (1958) 19

Roemer v. Board of Public Works of Maryland,
426 U.S. 736 (1976) 11

SEC v. Sloan,
436 U.S. 103 (1978) 23

Page

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 22

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 25

Testan v. United States,
424 U.S. 392 (1976) 11

TVA v. Hill,
437 U.S. 153 (1978) 17

United States v. American Trucking Associations,
310 U.S. 534 (1940) 15

United States v. E.I. duPont deNemours,
353 U.S. 586 (1957) 11

United States v. Mississippi Valley Generating Co.,
364 U.S. 520 (1961) 11

United States v. Rutherford,
442 U.S. 544 (1979) 14

United States v. Trans-Missouri Freight Association,
166 U.S. 290 (1897) 20

United States v. Zacks,
375 U.S. 59 (1963) 25

Statutes and Regulations:

5 U.S.C. 5104 2

5 U.S.C. 5332 2

5 U.S.C. 5333 8

5 U.S.C. 5334(a) 24

5 U.S.C. 5334(b) ..... *passim*

Page

5 U.S.C. 5335 16

5 U.S.C. 5336 16

5 U.S.C. 5341 3

5 U.S.C. 5342 2

5 U.S.C. 5343 ..... 3, 24, 25

5 U.S.C. 5346 15

5 U.S.C. 5596 5

28 U.S.C. 1491 5

Classification Act of 1949, Public Law 81-429, 63 Stat. 954 ..... 5, 7, 17

1954 Amendment to Classification Act of 1949, Public Law 83-763, 68 Stat. 1105 ..... 8, 9

1962 Amendment to Classification of 1949, Public Law 87-793, 76 Stat. 832 ..... 7, 16, 18, 23

1972 Prevailing-Rate Wage System Act, Public Law 92-392, 86 Stat. 564 ..... 18, 19

5 CFR 25.104 23

5 CFR 210.102(b)(12) 7

5 CFR 531.202(h)(2) 6, 14

5 CFR 531.204 ..... 22, 23

Miscellaneous:

FPM Supplement 296-33, Subchapter 14 7

FPM Chapter 531, Subchapter 2 8

Page

FPM Chapter 532-1:

Subchapter 4 3
Subchapter 5 3
Subchapter 6 ..... 3, 15
Subchapter 8 19

FPM Chapter 539, Subchapter 2 8

FPM Supplement 990-2 5

52 Comp. Gen. 671 (1973) 26

52 Comp. Gen. 695 (1973) 26

Office of Personnel Management Manual, Position Classification Standards, General Introduction, Background and Instruction 3

Fixing Wages and Salaries of Navy Civilian Employees in Shore Establishments, 1862-1945, Administrative Reference Service, Report No. 9, Records Administration Reference Service, Dept. of the Navy 2

The Wage Board System, Report of House Subcommittee on Manpower of the Committee on Post Office and Civil Service, 89th Congress, 2nd Session, March, 1966 2

H.R. Rep. No. 1264, 81st Cong., 1st Sess. (1949) 17, 24

S. Rep. No. 2120, 87th Cong., 2nd Sess. (1962) 21

H.R. Rep. No. 2525, 87th Cong., 2nd Sess. (1962) 21

H.R. Rep. No. 92-339, 92nd Cong., 1st Sess. (1971) 19, 20, 24

S. Rep. No. 92-791, 92nd Cong., 2nd Sess. (1972) 18

IN THE

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October Term, 1980

No. 80-1121

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH J. CLARK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS JOSEPH J. CLARK, ET AL.

This brief is submitted on behalf of respondents, Joseph J. Clark, et al. Respondents urge this Court to affirm the judgment of the Court of Claims.

COUNTERSTATEMENT OF THE CASE

A. Introduction

This case involves Federal employees of the Department of the Navy who were *promoted* from one Federal pay system to another. The two salary systems have been

generally outlined in petitioner's brief. Pursuant to merit promotion procedures, respondents, who were "prevailing-rate" Wage System employees, were promoted to positions in the General Schedule. The General Schedule is comprised of eighteen (18) grades (5 U.S.C. 5104 and 5332). Each grade is in turn divided into ten increments of pay or steps.[1] The General Schedule salaries by grade and step are consistent nationwide. There is some overlap of salaries between adjacent General Schedule grades, but the salary of the step of a higher grade is always greater than the salary of the same step of the grade immediately below (5 U.S.C. 5332).[2]

The prevailing-rate Wage System is a separate pay system from the General Schedule, and applies to those employees considered to be "prevailing-rate employees" (5 U.S.C. 5342).[3] Wage System employees include employees engaged in a recognized trade or craft. The determination of whether a position is within the General Schedule (GS) or Wage System (WS) is a classification matter. If a position clearly requires trade, craft, or laboring experience and knowledge as a requirement for the performance of its primary duty, and such requirement is

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[1]For GS grades GS-1 through GS-15, there are ten steps. There are nine steps for grade GS-16; five steps for grade GS-17; and only one step for grade GS-18.

[2]As an illustration of the overlap in salary of GS grades, using the 1974 GS salary schedule, the salary of a GS-11, Step 1 ($15,481.00) is higher than the salary of a GS-10, Step 1 ($14,117.00), but lower than the salary of a GS-10, Step 10 ($18,356.00) See Exhibit to Administrative Record, Allowed, Exhibit 9, page 14.

[3]For a review of the history of the Wage System and prevailing-rate determinations, see: *Fixing Wages and Salaries of Navy Civilian Employees in Shore Establishments, 1862-1945*, Administrative Reference Service, Report No. 9, Records Administration Division, Department of the Navy, May 1945; House Subcommittee on Manpower of the Committee on Post Office and Civil Service, 89th Congress, 2nd Session, March, 1966, report on *The Wage Board System*.

paramount, then the position is classified under the Wage System. Office of Personnel Management Manual, *Position Classification Standards, General Introduction, Background and Instruction,* (TS 47), Section IV, "Guidelines for the Determination of Trades, Crafts, or Manual Labor Positions" (January 1979). Otherwise, the position is classified in the General Schedule.

The Wage System is divided into fifteen (15) grades for non-supervisory employees and seventeen (17) grades for supervisory employees, with each grade consisting of five steps (5 U.S.C. 5343). The grade of a WS position is determined by comparison of the duties of the position with appropriate job grading standards, with consideration to the factors of skill and knowledge, responsibility, physical effort, and working conditions. *Federal Personnel Manual* (FPM), Chapter 532, Subchapter 6.[4]

Unlike the General Schedule, the rates of pay under the Wage System are not uniform nationwide. Rates of pay under the Wage System are based on a wage survey of prevailing rates for comparable work in the applicable local wage area. See: 5 U.S.C. 5341, 5343; FPM Chapter 532, Subchapters 4 and 5. The five steps of the Wage System are established as a percentage of the prevailing rate. 5 U.S.C. 5343(e). (J. A. 41).

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[4]The factors for grading non-supervisory jobs in the WS are set forth above. Supervisory WS employees are graded "through consideration of the volume, kinds, and levels of work involved, and the nature of the supervision exercised." FPM, Chapter 532, Subchapter 6-5b. Respondent D'Aversa was a supervisory WS employee before promotion. All other respondents were non-supervisory WS employees.

B. The Facts

Respondents, at all times material hereto, were civilian employees in the competitive service of the United States Department of the Navy. Pursuant to the Navy's Merit Promotion Program, each respondent was *promoted* from a position in the prevailing-rate Wage System to a position in the General Schedule.[5]

Five of the six respondents received a two step increase in salary upon promotion. Respondent Libretto, who was promoted after the other five respondents, did not. Libretto protested the pay setting incident to his promotion and requested that he also be properly accorded the two step increase in salary upon promotion (J.A. 47-51). The local Civilian Personnel Office of the Navy reviewed the different pay setting methods used to calculate respondents' pay in the General Schedule, and concluded that there was no pay setting policy in the *Federal Personnel Manual* (FPM) for promotion of employees from Wage System to General Schedule positions, and in turn, requested guidance from the Navy's Office of Civilian Manpower Management (J.A. 42-43). The Office of Civilian Manpower Management advised respondents' Commanding Officer that respondents' salary, following promotion from a Wage System to a General Schedule position, was to be made in accordance with the "highest previous rate

[5]For the Merit Promotion Program Vacancy Announcement, see: Exhibits to Administrative Record, Allowed, Exhibit 16, page 24 (Clark); Exhibit 23, page 39 (Libretto); Exhibit 30, page 53 (D'Aversa); Exhibit 45, page 91 (Proto); and Exhibit 50, page 97 (Scialpi and Wolfus). The Form 50, Notification of Personnel Action, are: J.A. 15 (Scialpi); J.A. 19 (Wolfus); J.A. 33 (D'Aversa); J.A. 35 (Libretto); and J.A. 37 (Clark). By virtue of his having previously held the GS position to which he was re-promoted, Proto was excepted from merit promotion procedures (J.A. 23).

rule", pursuant to FPM Supplement 990-2, Book 531, S2-4a(2) (J.A. 44-45).[6]

Accordingly, the Navy reduced the salary of five of the respondents to a GS salary based on the highest previous rate formula (J.A. 54-55). All six respondents submitted a grievance of the pay setting determination. This was rejected for the stated reason that the grievance involved matters of pay outside the jurisdiction of the local authority (J.A. 60-64). On January 29, 1976, respondents filed suit in the United States Court of Claims pursuant to the Tucker Act (28 U.S.C. 1491) and the Back Pay Act of 1966 (5 U.S.C. 5596). Respondents' Petition before the Court of Claims maintained that 5 U.S.C. 5334(b) entitled them to a two step increase upon *promotion* (J.A. 5-11).

On Cross-Motions for Summary Judgment, the Court of Claims held that 5 U.S.C. 5334(b) is applicable to promotions from a Wage System position to a General Schedule position (Pet. App. 1a-8a).

The Court of Claims held that since respondents had been promoted, they were entitled to pay setting which effected a two step increase in salary. The Court of Claims found that Congress, in enacting the predecessor to 5 U.S.C. 5334(b) (Section 802 of the Classification Act of 1949), intended that an increase in pay should concurrent-

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[6]The highest previous rate pay setting formula consists of a conversion of respondents' hourly salary to a per annum amount, followed by a determination of those steps within the assigned General Schedule grade the per annum salary fell. Where the per annum salary fell between two GS steps, the employee was given the higher rate of pay (J.A. 43). Pursuant to the highest previous rate formula, an employee *might not receive an increase* in pay upon promotion from the Wage System, when his hourly salary following conversion to a per annum salary is identical to a step within the GS grade to which he was promoted.

ly accompany a *promotion* in duties and responsibility (Pet. App. 7a).[7]

In response to the petitioner's allegations of administrative regularity, the Court of Claims found that regulations regarding respondents' pay setting were in and of themselves inconsistent (Pet. App. 5a), and had been applied in a confusing manner (Pet. App. A., note 7).

The case was thereafter remanded to the Trial Division of the Court of Claims for a determination of the total payment due each respondent. Petitioner submitted a Motion for Rehearing En Banc raising the same argument presented to this Court, which Motion was denied (Pet. App. 15a-16a). Thereafter, all parties stipulated to the amount of respondents' recovery and final judgment was entered on August 8, 1980 (Pet. App. 9a-14a).

C. The Statutory and Administrative Scheme

Pursuant to 5 U.S.C. 5334(b), an employee who is promoted to a position in a higher grade is entitled to a salary which exceeds his existing rate of pay by not less than a two step increase of the grade from which he is promoted (quoted in pertinent part in Pet. App. 4a).

Both petitioner and respondents agreed before the Court of Claims that the term "promotion" characterized the personnel action in issue. The Court below found that 5 CFR 531.202(h)(2) placed respondents' situation within the definition of promotion (Pet. App. A., note 5).

[7]Contrary to petitioner's characterizations otherwise, respondents were "promoted". At no time before the Court of Claims did petitioner contest the fact that respondents had been "promoted", and indeed characterized the personnel actions as promotions in its brief to the Court of Claims. (Pet. App. A., note 5).

The plain language of 5 U.S.C. 5334(b) provides that the two step increase applies to promotions and transfers to positions in a higher grade.[8] The characterization of the nature of each personnel action as a promotion was consistent with Federal Personnel Manual Supplement 296-33, Subchapter 14, *Guide to Processing Personnel Actions* (1981), which provides in Section 14-2(b)(2) that:

"(b) Promotion . . .

(2) When the old and the new positions are under different job classification systems and pay schedules, a promotion changes the employee to a position with a higher rate of pay."

As stated by the Court of Claims in its opinion, the concept of step increases for promotion originated as Section 802 of the Classification Act of 1949, Chapter 782, 63 Stat. 954, 969. Section 802 of the Classification Act of 1949 provided a one step increase upon promotion. A second step increase for promotion was added in 1962, by Section 604 of Public Law No. 87-793, 76 Stat. 832, 847-848.

Congress and the administrative agencies have clearly distinguished the concept of promotion from other personnel actions, such as appointment to a General Schedule position, or those actions by which an employee's position is converted from the Wage System to the General Schedule.

In those instances when an employee is hired to fill a position in the General Schedule, the Code (5 U.S.C.

[8]This personnel action is to be contrasted with "reassignment", which is the personnel change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion. 5 CFR 210.102(b)(12).

5333) provides that "new appointments shall be made at the minimum rate of the appropriate grade."[9] In a reassignment situation where an employee has moved into a position without promotion or demotion, the employee's salary is set by the highest previous rate rule. FPM Chapter 531, Subchapter 2-4.

In those instances where an employee's position is converted from the Wage System to the General Schedule, Subchapter 2 of Chapter 539 of the *Federal Personnel Manual* provides that the employee will receive, whenever possible, at least his or her former salary, and if the former salary of the employee falls between two steps of the grade in which his new position is placed, then his pay is fixed at the ***higher*** of the two rates.[10]

Congress specifically recognized this distinction between the pay setting mechanism following *promotion* to a position in the General Schedule, and the action of conversion of a position to the General Schedule without promotion, in the 1954 Amendment to the Classification Act. The Classification Act of 1949 originally established a pay schedule for the Crafts, Protective and Custodial Schedule, which was separate and distinct from the General Schedule. In the 1954 Amendment, which is Public Law 83-763, 68 Stat. 1105 (Sept. 1, 1954), Section 106, those positions in the Crafts, Protective and Custodial Schedule were included within the General Schedule. Section 106(c) of this Public Law 83-763 made it clear that:

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[9]As an illustration of this particular pay setting procedure, an employee hired as a GS-11 would begin at Step 1.

[10]In practice, the pay setting procedures used when a position *is converted* to the General Schedule is the "highest previous rate" rule now urged by petitioner for this case when respondents *were promoted.*

> "The conversion to grades of the General Schedule of positions covered by this section, and the initial adjustments in compensation as prescribed herein, *shall not be construed to be transfers or promotions* within the meaning of section 802(b) of the Classification Act of 1949, as amended, and the regulations issued thereunder." [emphasis added].

In this 1954 Amendment to the 1949 Classification Act, Congress clearly distinguished conversion of positions from separate pay systems to the General Schedule from transfers to a higher grade and promotion. The distinguishing feature of this matter is the nature of the personnel action. Congress has indicated that personnel actions of promotion and transfer to a higher grade are to be accorded higher salary setting than the process of conversion of positions from another pay system to the General Schedule and reassignment to another position, without promotion or demotion.

The statutory and administrative scheme of changes in pay rates coincident with a personnel action indicates that changes in salary are related to the characterization of the personnel action. In the instant matter, the personnel actions were characterized by the appropriate authority as *promotions.* Proper pay slotting must follow such promotions[11]

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[11]Respondents' promotions were as follows: Clark, from a WS ship surveyor (shipfitter) to a GS quality assurance specialist (process) (J.A. 37); D'Aversa, from a WS ship surveyor (pipefitter) to a GS supervisory production controller (shipbuilding) (J.A. 29, 33); Libretto, from a WS ship surveyor (machinist) to a GS engineering technician (drafting) (J.A. 35); Proto, from a WS ship surveyor (electrician) to a GS production controller (shipbuilding) (J.A. 23) and later to a GS contract negotiator (J.A 27); Scialpi, from a WS ship surveyor (shipfitter) to a GS contract negotiator (J.A. 15); and Wolfus, from a WS ship surveyor (machinist) to a GS contract negotiator (J.A. 19).

SUMMARY OF ARGUMENT

The decision of the United States Court of Claims below is correct and should be affirmed. The Court below held that the plain meaning of 5 U.S.C. 5334(b) provides that employees who are promoted are entitled to a two step increase in salary. It is unquestioned that respondents were promoted under Merit Promotion procedures, and petitioner so stipulated below. Respondents were promoted from Wage System positions to positions in the General Schedule, with increased duties and responsibilities.

The legislative history of 5 U.S.C. 5334(b) discloses that Congress intended that an increase in salary (of first one, then later, two steps) was to accompany an increase in duty and responsibility. There is no legislative history whatsoever to indicate that Congress intended that the provisions of 5 U.S.C. 5334(b) were to be limited only to promotions within the General Schedule.

Petitioner's reliance on regulations issued by the Civil Service Commission (later the Office of Personnel Management), which limit the provisions of 5 U.S.C. 5334(b) to promotion within the General Schedule, is misplaced. Regulations limiting an increase in pay upon promotion to less than two steps are not consistent with the mandate of 5 U.S.C. 5334(b).

Respondents applied for promotion, competed with other employees for General Schedule positions and were selected for General Schedule positions of increased responsibility, pursuant to Merit Promotion Procedures.

Petitioner may not nullify the express intent of Congress, to accord a two step increase in pay to these promoted respondents, by an inconsistent agency regulation. The decision of the Court of Claims to this effect should stand.

ARGUMENT

TITLE 5 U.S.C. 5334(b), WHICH REQUIRES THAT AN EMPLOYEE WHO IS PROMOTED IS ENTITLED TO A SALARY INCREASE OF AT LEAST TWO STEPS, APPLIES TO PROMOTIONS FROM POSITIONS IN THE WAGE SYSTEM TO THE GENERAL SCHEDULE.

A. Respondents Are Entitled To Appropriate Increase In Pay Following Their Promotions.

Each of the respondents was promoted on the basis of merit. The selection of each for promotion was based upon demonstrated capability under the merit promotion process. Thereafter, proper pay setting follows. This personnel action is to be distinguished from *Testan v. United States,* 424 U.S. 392 (1976), where the employees sought a promotion via legal proceedings. Respondents here were promoted by personnel action, and this fact has been conceded by petitioner below. And so the Court of Claims found. This finding is basic to the case. It should not be set aside, unless it is clearly erroneous. *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 758 (1976); *United States v. E.I. duPont de Nemours and Co.,* 353 U.S. 586, 598 (1957); and *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 526 (1961).

The promotions of respondents were effected pursuant to merit promotion procedures (See note 5 herein). Respondents applied for promotional consideration under the Merit Promotion Program of the Navy. Respondents were qualified applicants who competed with other employees for promotion to GS positions. They were selected for their GS positions by the appropriate authority.

At the time of their promotions, respondents were Grade 8, Ship Surveyors, in the Wage System. Grade 8 was the highest grade attainable for Ship Surveyors. Five of the six respondents (Libretto being the exception) were at the highest step of WS Grade 8 (step 5). The salary of respondents could be increased only through an increase in the prevailing rate; promotion within the Wage System to positions in another position classification; or promotion to the General Schedule.

Even the local Civilian Personnel Officer characterized the personnel actions of respondents as a "promotion", although he later evidenced uncertainty as to the proper pay setting for each (J.A. 42-43). The personnel action was, at all times, characterized as a promotion for all six respondents, even though the pay setting procedure used to determine the resulting GS salary for respondent Libretto was different from that used to determine the GS salary of the other respondents.

Petitioner argues in its brief to this Court that the action was characterized as a promotion only because of pay setting procedures and speculates in its brief that the personnel action did not result in respondents being placed in positions of greater duties and responsibility. No issue of the comparability of duties and responsibilities of respondents' positions initially in the Wage System, and later in the General Schedule after their promotions, was raised below by petitioner. Respondents submit, however, that the nature of action, recorded on the personnel action notice for each respondent [Standard Form 50, Notification of Personnel Action, Item 12] by the Navy's Civilian Personnel Office as a "promotion", conclusively indicates a contemporaneous determination that each respondent had been moved to a position of increased duties and responsibilities in the General Schedule compared to the

former Wage System position which each had previously occupied.[12]

Petitioner has presented no evidence whatsoever to demonstrate that respondents did not assume positions of greater responsibility and more difficult duties following their "promotions". Respondents' demonstrated experience as Wage Board employees qualified them for promotion to General Schedule positions.[13]

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[12]That a contemporaneous comparison of respondents' duties and responsibilities was made at the time respondents were promoted and that each respondent's promotion was from a position in a lower grade to a position in a higher grade is demonstrated by the personnel actions directed toward respondent Proto. In 1968, respondent Proto was "promoted" from the Wage Board position of Ship Surveyor (Electrical Systems) to the General Schedule position of Production Controller (Shipbuilding) [Exhibit to Administrative Record, Allowed, Exhibit 43, page 87]. Thereafter respondent Proto was "demoted" through a *"change to lower grade"*, as a result of a reduction-in-force (RIF) from the General Schedule position of Production Controller (Shipbuilding) to his former Wage System position of Ship Surveyor (Electrical Systems) [Exhibit to Administrative Record, Allowed, Exhibit 42, page 86]. Then in 1972, Proto was temporarily "promoted" from the Wage System position of Ship Surveyor back to the General Schedule position of Production Controller [Exhibit to Administrative Record, Allowed, Exhibit 41, page 85]. About one month later, Proto was again "demoted" through a *"change to lower grade"* from the General Schedule to his original Wage System position at the expiration of his temporary promotion [Exhibit to Administrative Record, Allowed, Exhibit 40, page 84]. In 1973 (the personnel action in issue), respondent Proto was again "promoted" from the Wage System position of Ship Surveyor (Electrician) to the General Schedule position of Production Controller (Shipbuilding) [Exhibit to Administrative Record, Allowed, Exhibit 38, page 82].

[13]The qualification requirements for the General Schedule position of Quality Assurance Specialist (Clark) include a background in performing and/or supervising all types of welding [Exhibit to Administrative Record, Allowed, Exhibit 16, page 25]. The requirements for the GS position of Engineering Technician (Drafting) (Libretto) include a practical background of experience gained through experience in the field, rather than a professional engineering

It is clear, therefore, that respondents were "promoted", as that term is commonly understood to mean an increase in duty and responsibility, and as this personnel action is defined in 5 CFR 531.202(h)(2). Proper pay setting must follow.

B. 5 U.S.C. 5334(b) Is Plain On Its Face That Respondents Are Entitled To A Two Step Increase Upon Promotion.

Pursuant to 5 U.S.C. 5334(b), respondents, upon being "promoted", are entitled to a two-step increase in salary. The meaning of a statute in the first instance is to be found in the very language of that particular statute itself. *Caminetti v. United States,* 242 U.S. 470, 485 (1917). See also: *Dameron v. Brodhead,* 345 U.S. 322, 326 (1953); *United States v. Rutherford,* 442 U.S. 544, 551-552 (1979). Where the language is sufficient in and of itself to enun-

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background [Exhibit to Administrative Record, Allowed, Exhibit 23, page 38]. The requirements for the GS position of Supervisory Production Controller (D'Aversa) include general and specialized experience in all areas of work in the field of shipbuilding [Exhibit to Administrative Record, Allowed, Exhibit 30, page 53]. The requirements for the GS position of Production Controller (Proto) include a general overall knowledge of conversion, overhaul and repair of Navy ships, and an overall knowledge of all basic trades [Exhibit to Administrative Record, Allowed, Exhibit 45, page 91]. The requirements for the GS position of Contract Negotiator (Scialpi and Wolfus) include understanding of the make-up of production costs with respect to overhead rates, labor skills, materials, machine operations, and processes required [Exhibit to Administrative Record, Allowed, Exhibit 50, page 97]. The typical duties of respondents in the Wage System position of Ship Surveyor was in connection with repair or overhaul work done by private contractors on ship structures and systems, to determine work required, estimate labor and material costs and time required, and to prepare detailed work specifications; to inspect work in process, and upon completion, to witness tests and make final acceptance or rejection decisions [Exhibit to Administrative Record, Allowed, Exhibit 18, page 27.].

ciate the purpose and policy of the legislation, this Court has consistently followed the express language of the statute. *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). The language of the statute is to be given its usual, ordinary, and commonly understood meaning, unless a contrary intention is clearly indicated by the statute itself. *DeGanay v. Lederer*, 250 U.S. 376, 381 (1919); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939); *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 199, n. 19 (1976).

The rationale of the Court below was entirely correct. The Court of Claims reviewed 5 U.S.C. 5334(b) and found that the plain and ordinary meaning of that particular statute compelled a finding that respondents were entitled to a two step increase upon promotion from positions in the Wage System to positions in the General Schedule. There is no wording, whatsoever, in 5 U.S.C. 5334(b) which limits its application only to promotions within the General Schedule *alone*. The language of the statute providing for a two step increase in salary above *the grade from which the employee is promoted or transferred* is a mechanical calculation of salary and does not, as petitioner now suggests in its brief, limit the application of 5 U.S.C. 5334(b) to promotions solely within the General Schedule, because the term "grade" is used. The term "grade" is also used for the various classification levels in the Wage System. *FPM* Chapter 532, Subchapter 6; and 5 U.S.C. 5346(c).[14]

[14]The Standard Form 50, Notification of Personnel Action, indicates that respondents held grades in the Wage System. Scialpi was a Grade 8, Step 5 in the Wage System (J.A. 15); Wolfus was a Grade 8, Step 5 (J.A. 19); D'Aversa was a Grade 8, Step 5 (J.A. 29); Libretto was a Grade 8, Step 4 (J.A. 35); and Clark was a Grade 8, Step 5 (J.A 37).

The plain language of 5 U.S.C. 5334(b) is that an increase in pay shall be accorded employees who are promoted, and thereby increase the salary of employees who have advanced in duty and responsibility. Such an increase in pay of two steps rewards the promoted employees who have merited promotion by their capable and responsible performance of duties. Federal employees who have performed satisfactorily for a period of time from one to three years are accorded a within-grade salary increase of one step. 5 U.S.C. 5335.

As recognition for high quality performance, employees may be awarded an increase in salary of one step in advance of the scheduled within-grade step increase. 5 U.S.C. 5336. Congress recognized that an increase in salary beyond a one step increase was appropriate when an employee performed so satisfactorily that a promotion to increased duties and responsibilities was in order, when it amended Section 802(b) of the Classification Act by Public Law 87-793 to provide for two step increases upon promotion.

Respondents competed with other employees and were accepted into General Schedule positions pursuant to Merit Promotion procedures. At that time, petitioner characterized the resulting personnel actions as "promotions". Had petitioner contemporaneously reviewed the personnel actions and concluded that respondents had merely been reassigned to duties of equal responsibility, then the appropriate Notification of Personnel Action would have so indicated. Once petitioner determined that the personnel actions in issue were promotions, proper pay setting, pursuant to 5 U.S.C. 5334(b), must be effected. The plain language of 5 U.S.C. 5334(b) does not provide for exceptions or discretion on the part of the petitioner in setting pay upon promotion.

C. The Legislative History And Purpose Of Section 5334(b) Was Correctly Expressed By the Court of Claims.

As the Court of Claims indicated in its decision, the legislative purpose of the one (then later, two) step increase in salary was to provide that "a promotion in pay should concurrently accompany a promotion in duties and responsibilities" (Pet. App. 7a, quoting H.R. Rep. No. 1264, 81st Cong., 1st Session).

In the instant matter, inquiry into legislative history and purpose is unnecessary, since the meaning of Section 5334(b) is plain and unambiguous on its face. *TVA v. Hill*, 437 U.S. 153, 184, n. 29 (1978). However, respondents submit that complete examination of the legislative purpose does support the decision of the Court below.

In 1949, Congress was concerned with simplifying and modernizing the classification and salaries of Federal employees. Prior to the 1949 Amendment to the Classification Act (Public Law 81-429), a promoted employee did not receive an increase in salary if his previous salary matched the new salary of the higher grade. If the previous salary fell between two rates of the higher grade, the promoted employee received the higher rate.[15] Section 802 of the Classification Act[16] was enacted to provide an increase in salary of one step above the existing salary for employees who had been promoted. H.R. Rep. 1264, 81st Cong., 1st Sess., page 12.[17]

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[15] In practice, this procedure for pay setting is the same as "highest previous rate" rule advocated by petitioner as applicable here. Clearly, Congress intended a pay setting upon promotion to provide a resulting salary greater than the "highest previous rate".

[16] Predecessor to 5 U.S.C. 5334(b).

[17] The pertinent statement of the Congress was not fully quoted by petitioner in its brief. Congress clearly indicated that a pay increase

This legislative purpose of an increase in salary for an increase in duties and responsibilities was continued, but modified, in 1962 by Public Law 87-793, to provide a two step increase in salary.

Prior to 1968, each Federal agency had its own Wage Board System and conducted its own area wage surveys. In October, 1968, a coordinated Federal Wage System was instituted through Executive Order to establish uniform policies and procedures for conducting wage surveys and setting wage rates. In 1972, Congress passed Public Law 92-392, 86 Stat. 564, which enacted into law the established principles and policies for fixing and adjusting the pay of prevailing-rate (WS) employees throughout the Federal government. This previously had been done administratively. S. Rep. 92-791, 92nd Cong., 2nd Sess., page 2.

Unlike the 1949 and 1962 amendments to the Classification Act, the 1972 legislation established an orderly, statutory system for fixing and adjusting the rates of pay of prevailing-rate employees. The 1949 and 1962 amendments to the Classification Act addressed the issue of promotion and provided first for a one, and later, a two step increase in pay. The 1972 legislation was concerned with pay setting for personnel actions (including

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was to accompany a promotion to greater duty and responsibility. "At present, a promoted employee receives no immediate increase if he is already receiving a rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates. In too many cases, accordingly, an employee who is promoted to greater responsibilities or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities. Subsection (b) of Section 802 corrects this situation."

promotion) within the prevailing-rate Wage System. The 1972 legislation did not, as petitioner suggests in its brief, approve the "highest previous rate" rule for pay slotting when respondents were promoted from the Wage System to the General Schedule. This 1972 legislation is not material to the issue of promotion from the Wage System to the General Schedule.

In any event, the Civil Service Commission provided, in *FPM* Supplement 532-1, Subchapter 8-3(d) (February 21, 1969 edition), that a promotion within the Wage System alone entitled the employee to only a one step increase in salary. Thus, Congress could not have [impliedly] "approved" the "highest previous rate" rule, when a completely different pay setting regulation [one step increase] was all that was in effect prior to the passage of the 1972 legislation for promotions within the Wage System. Moreover, the Civil Service Commission certainly did not then alter the provisions of *FPM* Supplement 532-1, Subchapter 8-3(d), following passage of the 1972 legislation [Public Law 92-392], to provide for an increase in pay pursuant to the highest previous rate rule for employees promoted within the Wage System.

The plain language of the 1972 legislation indicates that Congress was concerned with a matter entirely different from the promotion in issue here. Such legislation, therefore, has no significance in the interpretation of 5 U.S.C. 5334(b). *Rainwater v. United States,* 356 U.S. 590, 593 (1958); and *Penn Mutual Life Insurance Co. v. Lederer,* 252 U.S. 523, 538 (1920). Even in the 1972 legislation, Congress distinguished the "highest previous rate" rule from pay setting mechanics for promotions.[18]

[18]The House Report indicated that the highest previous rate rule was distinct from the minimum increase in pay an employee shall receive when promoted and the salary of new appointments. "The

The one, then two step increase in salary was enacted as 5 U.S.C. 5334(b) for the specific purpose of providing increased compensation to those employees who had been promoted, and who thereby assumed increased duties and responsibilities.

In the absence of an unmistakeable directive otherwise, the statutory language should not be construed to "run counter to the goals Congress clearly intended to effectuate". *NLRB v. Plasterers' Local Union,* 404 U.S. 116, 130 (1971).

Where the language of an act is clear, extraneous aids, such as committee reports and explanatory statements, cannot control the interpretation of the statute. Such aids are admissible to solve doubt, but should not be used to create it. *Railroad Commission of Wisconsin v. Chicago, Burlington, and Quincy Railroad Company,* 257 U.S. 563, 589 (1922).

In its brief, petitioner has cited certain remarks made at Congressional Committee hearings. These remarks, which were made at the hearing and were not considered essential for inclusion in the formal committee report, are accorded little weight in interpreting legislative intent. *McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488, 493-494 (1931). If remarks made by individual Congressmen during debate are not reliable to support the intent of Congress in enacting legislation [*United States v. Trans-Missouri Freight Association,* 166 U.S. 290, 318 (1897)], then comments by Civil Service representative, Stahl, are also not

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Commission's regulations may cover matters such as (1) the minimum increase in pay that an employee shall receive when promoted; (2) application of the highest previous rate rule; and (3) the conditions under which appointments may be made above the minimum rate of the grade." House Report No. 92-339, 92nd Congress, 1st Session, page 14.

the appropriate means to ascertain legislative intent. This Court has not been disposed to go beyond the formal Committee reports in reviewing legislative intent and purpose. *Lapina v. Williams,* 232 U.S. 78, 90 (1914).

The more important aspect of the legislative history is found in the committee reports, which indicate that Congress was concerned that employees who were promoted should receive a two step increase in pay. There is nothing in any formal committee report limiting the two step pay setting process to only those promotions *within* the General Schedule. (See: S. Rep. No. 2120, 87th Cong., 2nd Sess. (1962), page 25; and H.R. Rep. No. 2525, 87th Cong., 2nd Sess., (1962), page 61).

D. The Administrative Construction of 5 U.S.C. 5334(b) Has Not Been Consistent.

As this Court stated, early in this century, in *Houghton v. Payne,* 194 U.S. 88, 99-100 (1904):

> "Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the Courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers must yield to the positive language of the statute."

Petitioner argues, in its brief, that the administrative construction favorable to its position was impliedly adopted by Congress when the Classification Act of 1949 was amended in 1962. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. *Girouard v. United States,* 328 U.S. 61, 69 (1946).

When a regulation conflicts with the statute, the fact of subsequent re-enactment is immaterial, for Congress could not add to or expand the statute by impliedly approving the regulation. *Biddle v. Commissioner of Internal Revenue,* 302 U.S. 573, 582 (1938); *Leary v. United States,* 395 U.S. 6, 25 (1969); and *Commissioner v. Acker,* 361 U.S. 87, 93 (1959). Nor can long standing practice and approval, if such be found, alter clear and explicit statutory provisions. *Louisville and Nashville Railroad Company v. United States,* 282 U.S. 740 (1931).[19] And certainly, courts are not bound by administrative construction of statutes. *Burnet v. Chicago Portrait Co.,* 285 U.S. 1, 16 (1932); *Estate of Sanford v. Commissioner of Internal Revenue Service,* 308 U.S. 39, 52 (1939).

A rule out of harmony with the statute is a mere nullity. *Dixon v. United States,* 381 U.S. 68, 74 (1965). Interpretative regulations do not constitute a standard for judging a factual situation which is binding on this Court. *Skidmore v. Swift & Co.,* 323 U.S. 134, 139 (1944). An administrative construction cannot narrow the meaning of a statute. *Helvering v. Powers,* 293 U.S. 214, 224 (1934). The Civil Service Commission (later the Office of Personnel Management) may not, by regulation, narrow the meaning [and application] of 5 U.S.C. 5334(b) to the General Schedule, and exclude from the operation of the pay setting process those promoted from WS grades.

When petitioner attempted to limit the application of 5 U.S.C. 5334(b) through 5 C.F.R. 531.204, the Court of Claims pointed out, in its decision below, that such at-

[19] "Whatever doubt or uncertainty attached to the application of the provisions of the Act to the transactions under review lay in the appreciation of the facts, and appropriate action thereon, and not in the interpretation of the terms of the law after the facts had been ascertained." 282 U.S. at 758.

tempted limitation is inconsistent with the statutory provisions of 5 U.S.C. 5334(b), and therefore cannot be controlling. See: *SEC v. Sloan*, 436 U.S. 103, 118-119 (1978). Those provisions of 5 CFR 531.204, which petitioner relies upon to limit 5 U.S.C. 5334(b) only to the specific personnel actions of *promotions and transfers within* the General Schedule, were issued *after* Congress approved the two step pay increase upon promotion.[20] And thus, such regulatory limitation upon which petitioner relies, could have no effect in interpreting the 1962 legislation.

In 1962, Congress Addressed the increase in pay for promotion and amended the pay increase following promotion from one to two steps by Public Law 87-793. There was no language in the amendment, and there were no statements made by Congress in enacting Public Law 87-793. There was no language in enacting Public Law 87-793, which *excluded* application of 5 U.S.C. 5334(b) to promotions from the Wage System to the General Schedule. The 1962 legislation, however, did clearly indicate the intent of Congress to provide for an increase in pay upon promotion. As indicated previously herein, the 1972 codification of the Prevailing-Rate Wage System did not address the question of promotion from WS to GS positions at all.

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[20]The language of 5 CFR 531.204 and its predecessor regulation, 5 CFR 25.104, have not been consistent over the years. 5 CFR 25.104 (Fed. Register, Vol. 15, No. 45, 1950) did not expressly limit the application of Section 802(b) of the Classification Act. 5 CFR 25.104 (1/1/61) limited the provisions of Section 802(b) to re-promotions and transfers involving a promotion between Classification Act grades. 5 CFR 531.204 (1/1/64) limited the provisions of Section 802(b) to transfers involving a promotion between Classification Act grades. The current provisions of 5 CFR 531.204, on which petitioner relies, which limits Section 802(b) to transfers and promotion within the General Schedule, were not issued until after Public Law 87-793 (1962) was enacted.

In enacting the 1949 Classification Act, Congress authorized the Civil Service Commission, pursuant to Section 802(a) [now 5 U.S.C., Section 5334(a)], to issue regulations governing the basic compensation which an employee may be paid after promotion and other personnel actions. H.R. Rep. No. 1264, 81st Cong., 1st Sess., page 12. Prior to 1949, regulations regarding administration of employee's salary had been issued by various agencies or through reference to decisions of the Comptroller General. Section 802(a) of the 1949 Classification Act was enacted to authorize the Civil Service Commission to prepare a comprehensive, unified set of rules. In 1972, Congress provided, in paragraph (5) of Section 5343(c) of Title 5, U.S. Code, that the Civil Service Commission was to issue rules regarding the administration of pay which a prevailing-rate employee would receive upon promotion. H.R. Report No. 92-339, 92nd Cong., 1st Sess., page 14.

This authority granted to the Civil Service Commission to prescribe regulations, pursuant to 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c), governing the administration of pay for employees who are promoted, appears to conflict with 5 U.S.C. 5334(b), by which Congress itself mandated a two step increase upon promotion. The confusion only arises as a result of the issuance of conflicting regulations by the Civil Service Commission, and not as a result of the clear and unmistakable intent of Congress.

In enacting 5 U.S.C. 5334(a) and (b), Congress did not intend to grant the Civil Service Commission authority to issue regulations, pursuant to 5 U.S.C. 5334(a), to limit or nullify the specific provisions of 5 U.S.C. 5334(b), which provides for a two step increase upon promotion. One part of a statute should not be construed to annul or destroy what has been clearly granted by another section of the statute. *Peck v. Jenness,* 48 U.S. 612, 623 (1849).

It is the duty of this Court to give effect to all portions of a statute if that is possible. *United States v. Zacks,* 375 U.S. 59, 69 (1963). A statute should not be interpreted so as to render one part inoperative. *Colautti v. Franklin,* 439 U.S. 379, 392 (1979).

Neither should the Court interpret the provisions of 5 U.S.C. 5334(a) to render the application of 5 U.S.C. 5334(b) as a mere redundancy. *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307-308 (1961).

There is no doubt that Congress may authorize a Federal agency to issue regulations to effectuate the purpose of the statute, as was done here by 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c). *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 398 (1940). However, where, as here, a regulation issued by the agency is contrary to the unambiguous purpose of 5 U.S.C. 5334(b), and amounts to an attempt to legislate, such regulation cannot stand. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943).

The authority granted to the Civil Service Commission [Office of Personnel Management], pursuant to 5 U.S.C. 5334(a) and 5 U.S.C. 5343(c), is to prescribe regulations regarding administration of the pay setting procedures upon promotion, but it does not have authority to limit or negate the provisions of 5 U.S.C. 5334(b). The role of that office is merely to administer and formulate pay setting mechanics to insure uniformity among Federal agencies, after Congress has spoken.

Petitioner has cited decisions of the Comptroller General for the proposition that the highest previous rate is the pay setting mechanism to be used upon promotion of an employee from Wage System to General Schedule.

The Comptroller General has also applied the highest previous rate to instances when a position was converted from the Wage System to the General Schedule, or where the employee transferred from the Wage System to the General Schedule. 52 Comp. Gen. 671 (1973); 52 Comp. Gen. 695 (1973).

The Comptroller General's decisions do not distinguish pay setting methods followed in instances where a position is converted or transferred from Wage System to General Schedule from those cases where an employee is *promoted* from the Wage System to the General Schedule. Such rationale is clearly contrary to the plain language of 5 U.S.C. 5334(b), and the legislative intent that an employee who is promoted should receive an increase in salary.

For the Court to accept the administrative construction of a statute, when the statutory language is doubtful, the administrative construction must be consistently applied. Here, the language of the statute is not doubtful. And here, the administrative construction has certainly not been consistent. We need look no further to find such inconsistency than in the pay setting methods employed by the Navy following the promotions of these respondents.

For as the Court of Claims observed in its opinion, the Navy paid five of the respondents with a two step increase, then changed its mind, refused to pay the other, then reneged on the increase for the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim (Pet. App. A., note 7). The administrative interpretations, in this case, have not been uniformly applied. Such interpretations, therefore, have no weight in the statutory interpretation here.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH J. CLARK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Statutes and regulations:

Pub. L. No. 95-454, 92 Stat. 1218 5
5 U.S.C. (1952 ed.) 1082(7) 4
5 U.S.C. 5101(1)(B) 1
5 U.S.C. 5102(a)(5) 1, 4
5 U.S.C. 5102(c)(7) 3
5 U.S.C. 5104 1
5 U.S.C. (Supp. III) 5331(b) 3
5 U.S.C. 5334 3
5 U.S.C. 5334(b) 1, 2, 3, 4, 5
5 U.S.C. 5337 5
5 U.S.C. 5345 5
5 U.S.C. (Supp. III) 5361-5366 4
5 C.F.R. 531.202(h)(1) 2
5 C.F.R. 531.202(h)(2) 1, 2, 3

Miscellaneous:

H.R. Rep. No. 1264, 81st Cong., 1st Sess. (1949) 3

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1. Respondents assert (Br. 11-14) that the two-step rule of Section 5334(b) necessarily applies here because the GS positions they obtained had been advertised as "merit promotions." This assertion is founded on the false assumption that "promotions" from WS positions to GS positions are equivalent to promotions within the GS system. As explained in our opening brief (at 20-21), an employee "promoted" to a higher grade within the GS system, by the express terms of the statute, assumes greater duties and responsibilities *by definition*. See 5 U.S.C. 5102(a)(5); see also 5 U.S.C. 5101(1)(B), 5104. When employees are "promoted" to the GS system from lower paying positions in the wholly separate WS system, there is no comparable inherent increase in responsibility.

As explained in our opening brief (at 13-15), a "promotion" from a non-GS system to the GS system is defined in the Civil Service regulation on which the Court of Claims relied, 5 C.F.R. 531.202(h)(2), in terms of whether the

employee receives an increase in pay. The fact that a vacancy is filled through "merit promotion" procedures does not necessarily signify that the employee selected for the position is assuming a more responsible position, nor does it even guarantee that the employee selected will receive a salary increase and, thus, ultimately be classified as having been "promoted."[1] Moreover, to make the applicability of Section 5334(b) depend upon whether the employee receives a "promotion" under 5 C.F.R. 531.202(h)(2) would turn the analysis on its head by requiring *reference* to the final rate of pay in order to *determine* the final rate of pay. Here, for example, the characterization of respondents' personnel actions as a promotion, which forms the basis for the Court of Claims' holding, is solely a consequence of the Navy's discretionary application of the "highest previous rate" rule to provide an increase in pay. By contrast, a promotion within the GS system is defined as a change from one GS grade to a higher GS grade, 5 C.F.R. 531.202(h)(1) (see Gov't Br. 14 n.11); because it does not depend on the new rate of pay, this provision can be used as a benchmark to determine the applicability of Section 5334(b).

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[1]For example, in May 1973, the Navy could have advertised a GS-5 position under merit promotion procedures. The person appointed to that position could receive an annual salary between $7,694 (GS-5, step 1) and $10,007 (GS-5, step 10). If the position were filled by a blue-collar worker receiving pay in grade WG-10, step 1, whether that transfer would be classed as a "promotion" would depend on where the blue-collar worker had been employed. If he had been employed in the Columbus, Georgia Wage Area, his salary would have been $8,008 ($3.85/hour), and he could have been promoted to a GS-5, step 3, at $8,208. If he had been employed in the Detroit, Michigan Wage Area, however, his old salary would have been $11,502 ($5.53/hour), and he would have had to take a pay cut, or "demotion," to GS-5, step 10, at $10,007.

The availability of a two-step pay increase thus does not depend on whether the new position is obtained by "merit" or whether it qualifies as a "promotion" under 5 C.F.R. 531.202(h)(2).[2] Indeed, as respondents recognize in the WS context (Br. 19-20 n.18), the legislative history clearly establishes Congress' intent that the minimum salary increase attending some "promotions" be governed not by Section 5334(b), but by Commission regulations. See H.R. Rep. No. 1264, 81st Cong., 1st Sess. 12 (1949); Gov't Br. 13 & n.10. Rather, Congress manifestly intended to make the increase available only to promotions or transfers within the GS system.[3] The focus of the provision is exclusively on General Schedule employees; the subchapter containing Section 5334 is entitled "General Schedule Pay Rates," and it expressly excludes blue-collar workers from its coverage. 5 U.S.C. (Supp. III) 5331(b) and 5 U.S.C. 5102(c)(7). Indeed, when Section 5334(b) was first enacted in 1949, the only reference in the civil service statute to the prevailing rate salary system was a provision *excluding* blue-collar

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[2]Respondents suggest (Br. 13-14 & n.13) that they are entitled to a two-step increase because, apart from any administrative definition, the positions that they obtained in the GS system were positions of greater responsibility than their previous positions, *i.e.*, "promotions." However, the applicability of Section 5334(b) does not turn on this question. If it did, the courts would have to decide the applicability of the two-step pay increase by comparing, in each individual case, the relative responsibilities of the old and new positions. Congress could not possibly have intended to impose this burden on the courts.

[3]Amicus curiae AFL-CIO erroneously suggests (Am. Br. 13) that the government conceded in the Court of Claims that employees who move from the GS system to the WS system, or who are promoted within the WS system, receive a two-step increase. As was explained in detail in our opening brief (at 15-16 n.13), the government has always maintained that such employees do not receive a two-step increase; the statute expressly excludes them from the coverage of Section 5334(b) (see 5 U.S.C. (Supp. III) 5331(b) and 5 U.S.C. 5102(c)(7)), and their salary is determined by Commission regulations.

workers from its coverage and stating that their compensation should be fixed (administratively) "in accordance with prevailing rates." 5 U.S.C. (1952 ed.) 1082(7). Moreover, the language of Section 5334(b) cannot be reconciled with respondents' contention that it applies to WS employees who transfer to GS positions. As explained in our opening brief (at 12), Section 5334(b) applies only to employees promoted from one "grade," defined in 5 U.S.C. 5102(a)(5) as a range of pay *in the General Schedule*, to a higher grade.[4]

2. Amicus curiae AFL-CIO asserts (Br. 4-5) that the provision in Section 5334(b) concerning an employee receiving "basic pay at a rate saved to him under subchapter VI" demonstrates the statute's applicability to WS employees when they are transferred into the GS system. Subchapter VI, 5 U.S.C. (Supp. III) 5361-5366, provides for salary retention for certain employees who are reduced in grade for reasons unrelated to their job performance. Section 5334(b) protects such a GS employee against the possibility that his salary, which exceeds the normal salary for his grade level, will be reduced despite the statutory two-step increase when he is promoted to a higher GS grade. It specifies the employee's salary as the higher of his retained basic pay or his salary as computed under the Section 5334(b) formula.

The fact that Subchapter VI provides retained basic pay for WS employees, in addition to GS employees, casts no doubt on the conclusion that Section 5334(b) applies only to promotions within the GS system. On the contrary, the history of this provision provides further evidence that

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[4]Ignoring the statutory definitions, respondents point out (Br. 15) that the term "grade" is also used in Subchapter IV to describe the classification levels in the WS system. However, this usage of the term "grade" in the statute originated in 1972, long after Section 5334(b) was enacted in 1949.

Congress intended that Section 5334(b) apply only to promotions within the GS system. Prior to the enactment of Subchapter VI in 1978 (Pub. L. No. 95-454, 92 Stat. 1218), the civil service pay statute provided for retained basic pay in two different sections. Section 5337 provided for salary retention for GS employees, and Section 5345, enacted in 1972, provided for salary retention for WS employees. Significantly, the provision of Section 5334(b) protecting this retained basic pay applied only to GS employees; it protected "an employee so promoted or transferred [who] is receiving basic pay at a rate saved to him under *section 5337* of this title * * *." 5 U.S.C. 5334(b) (emphasis added). Thus, this provision demonstrates Congress' understanding that Section 5334(b) does not apply to employees transferring from the WS system to the GS system.

3. Respondents assert (Br. 21-26) that the administrative construction of Section 5334(b) has not been consistent and therefore is entitled to no deference. Respondents apparently rely for this proposition (Br. 23 n.20) on the fact that there have been some changes in the language of the applicable regulation since 1950. Respondents do not contest, however, that the relevant agency regulations and interpretations have always provided that Section 5334(b) applies only to promotions within the General Schedule. See Gov't Br. 23-25. Neither irrelevant changes in the language of the regulation nor the fact that an administrative error was made at first in computing respondents' salaries (Resp. Br. 26) diminishes the force of this longstanding official agency interpretation.

For the foregoing reasons and the reasons set forth in the government's opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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No. 80-1121

IN THE

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OCTOBER TERM, 1980

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v.

JOSEPH J. CLARK, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Applies To Promotions Or Transfers From WS Positions As Well As From GS Positions	3
B. The Legislative History And Purposes Of Section 5334(b) Confirm That It Was Meant To Include Promotions And Transfers From Wage System Positions	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102 (1980)	4
Diamond v. Chakrabarty, 447 U.S. 303 (1980)	13
Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129 (1936)	8
March v. United States, 506 F.2d 1306 (D.C. Cir. 1974)	12
United States v. Larionoff, 431 U.S. 864 (1977)	8
T.V.A. v. Hill, 437 U.S. 153 (1978)	9
Yates v. United States, 354 U.S. 298 (1957)	9

Statutes and Regulations:

5 U.S.C.	§ 5102	4
	§ 5102(a)(5)	5
	§ 5301-5385	4
	§ 5334(a)	8
	§ 5334(b)	2, 3, 4, 8
	§ 5343(e)(1)	6
	§ 5343(e)(2)	6
	§ 5346	6
	§ 5361	4, 5
	§ 5361(4)	5
	§ 5361-5366	4
5 C.F.R.	§ 531.202(h)	7
	§ 531.203(c)	8
	§ 532.506(d)(1)(2)	6
	§ 532.702(b)	6
	§ 536.201	6

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BRIEF OF AMICUS CURIAE PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO

INTEREST OF THE AMICUS

The Public Employee Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) files this brief, *amicus curiae*, in support of the position of Respondents, Joseph J. Clark, *et al.*, pursuant to Rule 36 of the Rules of the Supreme Court.* The Public Employee Department is an association of national and international labor unions which are affiliated with the AFL-CIO and have members employed in the public sector. Its objectives include promoting and securing improved wages, hours and working conditions

* All parties consented to the filing of this *amicus curiae* brief.

of government workers through collective bargaining, legislation, and other appropriate means.

The Public Employee Department offers its *amicus curiae* brief in this case on behalf of the interests of the federal employees who are represented in a collective bargaining capacity by its constituent labor organizations and who may be affected by the decision of this Court.

SUMMARY OF ARGUMENT

This case presents a question of statutory interpretation, i.e., whether a federal employee who is promoted or transferred from a Wage System (WS) position to a General Schedule (GS) position in a higher grade of pay is entitled to the minimum two step pay increase required under 5 U.S.C. Section 5334(b). In the Court of Claims, the Respondents claimed that they were entitled to the two step increase under this statutory provision when they were promoted from their WS jobs to certain GS positions. The Petitioner United States, as the employer of the Respondents, contended that this two step increase only applies when the promotion or transfer takes place from a GS position to a higher GS position. In rejecting Petitioner's arguments, the Court of Claims held that the language and intent of the statutory provision applied equally to those federal employees who are promoted from a prevailing rate WS position to a GS position. (Pet. App. 1a-8a).

The decision of the Court of Claims was correct. The plain language of 5 U.S.C. § 5334(b) does not contain the limitation which the Petitioner seeks to read into it. The Petitioner mistakenly relies on the language of the statute which refers to "the *grade from* which he is promoted or transferred" (emphasis supplied) as proof that the promotion or transfer must be from a GS position. That clause was included in the statute to set a standard for mechanically fixing the actual pay increase

rather than to carve out a group of employees who were equally deserving of its beneficial treatment. In any event, contrary to Petitioner's suggestion, the Wage System also contains "grades" from which an employee could be promoted or transfered into the GS System.

In addition to the language of the law, the legislative history and purpose also support the statutory construction of the Court of Claims. Congress enacted 5 U.S.C. § 5334(b) and its predecessor provision in order to guarantee that federal employees who receive a promotion or transfer into a higher grade would be assured a specified minimum increase in pay to match the increase in duties and responsibilities that the Government assigned to them. This policy has equal force and application whether the employee was promoted or transferred from a WS position or from a GS position. No legislative history has been cited by Petitioner which would sustain its inequitable argument that Congress intended to bar WS employees from the protective benefits of the statute.

ARGUMENT

TITLE 5 U.S.C. § 5334(b), WHICH REQUIRES AT LEAST A TWO STEP PAY INCREASE FOR EMPLOYEES PROMOTED OR TRANFERRED TO A POSITION IN A HIGHER GRADE, APPLIES TO CHANGES OF POSITION FROM THE WAGE SYSTEM TO THE GENERAL SCHEDULE AS WELL AS WITHIN THE GENERAL SCHEDULE.

A. The Plain Language Of The Statute Demonstrates That Section 5334(b) Applies To Promotions Or Transfers From WS Positions As Well As From GS Positions.

The starting point in every case which involves the interpretation of a statute is the language of the statute itself. Unless there is a clearly expressed legislative intent to the contrary, the language of the statute must be

regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). Section 5334(b) states in pertinent part:

> (b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred . . .[1]

The term "employee", as used in this section, is defined as "an individual employed in or under an agency." 5 U.S.C. §§ 5102, 5331. Simply stated, the reference to "employee" in Section 5334(b) encompasses all employees working for a federal agency and no distinction is drawn between WS or GS workers. Thus, the Respondents who were WS employees are covered under this provision.

Indeed, Section 5334(b) further states that "[i]f an employee so promoted or transferred is receiving basic pay at a rate saved to him under subchapter VI of this chapter . . ." he is entitled to specified pay benefits upon a reduction in force.[2] Subchapter VI, in turn, defines "employee" to include ". . . a prevailing rate employee, as defined by Section 5342(a)(2). . . ." 5 U.S.C. § 5361. These are precisely the WS employees at issue here. Moreover, the reference in Section 5334(b) to a promoted employee's "basic pay at a rate saved to him under subchapter VI" is defined in subchapter VI ". . . in the case of a prevailing rate [WS] employee, [as] the scheduled rate of pay determined under section 5343 of this Title."

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[1] This statutory provision falls within Chapter 53 (Pay Rates and Systems) of Title 5 which governs employees in both the WS and GS systems. 5 U.S.C. §§ 5301-5385.

[2] Subchapter VI (5 U.S.C. §§ 5361-5366) applies to grade retention for WS and GS employees following a change of positions or a reclassification.

5 U.S.C. § 5361(4). In short, rather than excluding WS employees, Section 5334(b) expressly provides for their protection when they are promoted or transferred into the GS system.

Furthermore, as the Court of Claims noted below, it is undisputed that the Respondents were "promoted" to a higher grade and level of pay. (Pet. App. 2a, 4a; J.A. 15-37). Accordingly, each Respondent was "[a]n employee who is promoted or transferred to a position in a higher grade." Section 5334(b). In this context, the lower court properly determined that the Respondents were "entitled" to at least a two step increase guaranteed by Section 5334(b).

The Petitioner concedes that Section 5334(b) contains no express limitation on where the employees must be promoted or transferred from in order to be entitled to the two step increase. Nevertheless, in a strained analysis, the Petitioner contends in its brief (p. 12) that because the section guarantees that a promoted employee is to be paid "not less than two step increases of *the grade from which he is promoted or transferred*" (emphasis supplied), and the term "grade" is defined by 5 U.S.C. § 5102(a)(5) as rates of pay in the General Schedule, the promoted or transferred employee must come from a GS position to qualify for this entitlement. This contention misses the mark.

The phrase "the grade from which he is promoted or transferred" was aimed merely at providing the standard or method for actually computing the pay increase. In other words, the reference point for calculating the two step increase was the grade *from* which the employee came and not the grade *to* which he was assigned. Contrary to Petitioner's theory, the phrase was not designed to narrow the scope of Section 5334(b) to GS employees. If this was Congress' objective it surely would have chosen more direct and understandable language to establish such a limitation.

In any event, while Petitioner has tried to bolster its position by stressing the use of the term "grade" in the GS System, it has conveniently failed to mention that the terms "grade" and "steps" are also prevalent in setting pay rates in the Wage System.[3] In fact, the Civil Service Regulations of the Office of Personnel Management (OPM) refer to "grades" for employees under the prevailing rate or Wage System. 5 C.F.R. § 532.506(d)(1)(2), § 532.702(b). See also, FPM Chapter 532, Subchapter 6.[4]

Clearly, the term "grade" is not unique to the GS system. Here, it is uncontested that each of the Respondents was promoted from the position of Ship Surveyor, a "Grade 8" within the Wage System. (Pet. App. 2a; Form 50 "Notification of Personnel Action", J.A. 15-37).[5] In these circumstances, it is beyond question that the Respondents were promoted or transferred from a lower "grade" and are thus not excluded from the literal overage of Section 5334(b).

Without reference to any language in the statute, the Petitioner belatedly argues that the promotions which the Respondents received were not the type of promotions contemplated in Section 5334(b).[6] The Petitioner claims

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[3] *See, e.g.*, 5 U.S.C. § 5343(e)(1) ("Each grade of a regular wage schedule for nonsupervisory prevailing rate employees shall have 5 steps . . ."); 5 U.S.C. § 5343(e)(2) (a prevailing rate employee advancing "to the next higher step within the grade"); 5 U.S.C. § 5346 (establishing a "Job grading system" for WS employees); 5 U.S.C. §§ 5361-5366 (grade retention for prevailing rate employees).

[4] OPM even has a regulation for the comparison of grades in different pay systems. 5 C.F.R. § 536.201.

[5] Five of the Respondents were at the step 5 level of grade 8, and one Respondent, Nicholas J. Libbretto, was at the step 4 level. (J.A. 15, 19, 23, 35, 37).

[6] Before the Court of Claims, the Petitioner did not contest the fact that the Respondents were "promoted" employees, as that

that the Respondents were "nominally" promoted only because their employing agency, the Navy Department, gave the Respondents an increase in salarly upon assignment to their new positions (Brief, pp. 13-14). The Petitioner would thus have this Court believe that the Respondents were "promoted" only in a technical sense pursuant to 5 C.F.R. § 531.202(h) which states "Promotion means a change of an employee, while continuously employed, from . . . [a] lower rate paid under authority other than subchapter 14 of Chapter 53 of Title 5, United States Code, to a higher rate within a General Schedule grade."

As the Court of Claims found, however, each of the six Respondents received not just a promotion in the limited technical sense of 5 C.F.R. § 531.202(h), but applied for and was appointed to his new position pursuant to the Department of the Navy Merit Promotion Program. (Pet. App. 2a; Form 50, "Notification of Personnel Action", J.A. 15-37). Regardless of whether the Respondents received a merit promotion, a "nominal" promotion as the Petitioner puts it, or were merely "transferred to a position in a higher grade", Section 5334(b) applies to them and all such employees. The statute contains no limitation on the *type* of promotion which is necessary to qualify for the entitlement, and the Petitioner has offered no reading of the statute which would discriminate among promotions. On the contrary, Congress' use of the broad, catchall word "transferred" reflects an intention to bring within the beneficial coverage of Section 5334(b) all those employees who are moved to a higher grade by their agency-employer.

The Petitioner also implies (Brief, pp. 14-15) that since the promotions were a result of its purely discretionary act of giving the Respondents an initial salary

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term is commonly understood in an employment context. (Pet. App. 2a, 4a).

increase in their new positions, it should not be obligated to pay them the entire two step increase. Of course, any time the Government promotes one of its employees (whether on merit or not) or transfers an employee to a higher grade, it is a discretionary act. To make an exception for promotions that were made at the Petitioner's discretion would render Section 5334(b) a nullity.

The Petitioner advances the additional argument that 5 U.S.C. § 5334(a) grants OPM carte blanche to prescribe regulations establishing the basic rate of pay for employees (such as the Respondents,) whose appointments or positions have been changed, and therefore it had the authority to deny the Respondents a two step increase. The regulation which OPM has promulgated pursuant to this subsection, known as the "highest previous rate" rule (5 C.F.R. § 531.203(c)), was invoked to deny the Respondents a two step increase. The Petitioner claims that its "express authority under Section 5334(a) to set standards governing GS rates of pay is not superseded here by the limited exception contained in 5 U.S.C. § 5334(b)." (Brief, p. 12). Section 5334(a) mandates, however, that the regulation issued by OPM with regard to the rates of pay must be ". . . in conformity with this subchapter . . ." As the Court of Claims correctly decided, the "highest previous rate" rule is *not* in conformity or consistent with Section 5334(b). (Pet. App. 8a). Accordingly, such regulation is invalid. *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

It is clear that Section 5334(b) applies on its face to all employees who are promoted or transferred to a position in a higher grade from a position in either the General Schedule or Wage System. The statute contains no language which limits its applicability to promotions or transfers solely within the General Schedule. Section 5334(b)—like all statutory provisions—should be read

according to the normal and obvious import of its wording "without resorting to subtle and forced construction for the purpose of . . . limiting . . . its operation." *Yates v. United States*, 354 U.S. 298, 311 (1957).

B. The Legislative History and Purposes of Section 5334(b) Confirm That It Was Meant To Include Promotions And Transfers From Wage System Positions.

When the language of a statute is clear and unambiguous, as the language of Section 5334(b) is, the courts will ordinarily not need to look at its legislative history as a guide to its meaning. *T.V.A. v. Hill*, 437 U.S. 153, 184 n. 29 (1978). Nevertheless, the relevant legislative history of Section 5334(b) reinforces the Court of Claims' conclusions below.

The Court of Claims held, and the Petitioner admits, that Section 5334(b) was intended to insure that a promotion in duties and responsibilities would carry with it an increase in pay. As the lower court noted, the House Report on Section 802 of the Classification Act of 1949 (63 Stat. 954, 969),[7] which was the predecessor to the current Section 5334(b), leaves little doubt as to what Congress intended:

> Subsection (b) of section 802 provides that *any officer or employee* who is promoted or transferred to a position in a higher class or grade shall receive basic compensation at the lowest rate of the higher class or grade which is at least one step increase above his existing rate of basic compensation.
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> • • • •
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> At present, a promoted employee receives no immediate increase if he is already receiving a rate in the lower grade that also occurs in the higher grade. If he is receiving a rate in the lower grade that falls between two rates of the higher grade, he is promoted at the higher of these two rates.

[7] The House bill passed in lieu of the Senate's version of the bill.

> In too many cases, accordingly, an employee who is promoted to greater responsibility or more difficult duties receives no immediate increase in pay. This is not in accord with the commonly accepted principle that a promotion in pay should concurrently accompany a promotion in duties and responsibilities.
>
> Subsection (b) of section 802 corrects this situation. (emphasis supplied).

H. Rep. No. 1264, 81st Cong., 1st Sess., *reprinted in* [1949] U.S. CODE CONG. & AD. NEWS 2363, 2375. This section by section analysis contained in the House Report makes it clear that Congress intended to cure widespread administrative abuses in the promotion process by ensuring that *all* employees who were promoted to a GS position would receive an increase in salary. As the House Report stated, the section applies to "any officer or employee" who had been promoted or transferred to a GS position which pays more than his "existing rate of basic compensation". Congress could not have worded this section more broadly to achieve its purposes.

The Petitioner erroneously argues that Section 5334(b) was solely intended to address an inequity peculiar to the GS system; namely, the overlap of GS grades which denied a pay increase to employees who were promoted from an upper step of a lower GS grade to the first step of a higher GS grade. First, Wage System grades also overlap General Schedule grades.[8] Second, absent coverage under Section 5334(b), it is obvious that a WS employee who is moved to a GS job (like each of the Respondents here) could receive a reduction in salary even though his agency-employer had assigned him in-

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[8] For example, Respondent LiBretto was employed at WS Grade 8, Step 4, in which he earned $16,473.60 per year. This grade fell between step 4 ($16,138) and step 5 ($16,627) of Grade 11 of the General Schedule. (Pet. App. 2a, J.A. 35).

creased duties and responsibilities. The problem addressed in Section 5334(b) impacts both blue-collar (WS) and white-collar (GS) workers alike and there is no legislative history which shows that Congress' solution to the problem was for the exclusive benefit of the GS employees.

The Petitioner boldly states that it might have, at its discretion, forced the Respondents to take a cut in pay when they were awarded their merit promotions. (Brief, p. 14). This is precisely the evil which Congress sought to eliminate when it enacted Section 802 of the Classification Act of 1949. Congress, over thirty years ago, made a policy decision that federal employees would not be asked to shoulder increased duties and responsibilities without a commensurate increase in salary. The Department of the Navy has no authority to contravene this policy determination by depriving federal employees of their statutory entitlements as part of a government-wide effort to reduce expenditures.[9]

In contrast to the broad purpose described in the House Report analyzing Section 802 of the Classification Act of 1949, *supra*, the Petitioner has cited no legislative history which would demonstrate that Congress

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[9] The Petitioner contends that there is "no reason for Congress to require an automatic pay increase for every WS employee who is promoted into the General Schedule." (Brief, p. 20). Unlike GS employees, Petitioner believes WS employees do not need a monetary incentive to take on increased duties and responsibilities of a promotion into a higher GS position, because WS employees would be satisfied with "the enhanced prestige of a white collar job" and "better working conditions". (Brief, p. 21). These general assumptions, especially the absurd notion that blue-collar workers do not need or desire the same monetary benefits afforded white-collar workers, are wholly unsupported in the legislative history or in the record of this case. It is respectfully submitted that Petitioner's resort to this sophistry underscores the overall weakness in its position.

intended to limit the two step entitlement to promotions within the General Schedule. While the House and Senate Reports [10] and the remarks of some members of Congress [11] indicate that Section 5334(b) applies to employees who are promoted from GS positions, they do not state that those are the only employees who are to be protected under Section 5334(b). The two step increase obviously applies to employees who are promoted within the General Schedule, and it is not surprising that Congressmen Lesinski and Dulski referred to promotions within the General Schedule when describing how the provision would work, since most federal employees are covered by the General Schedule and there will be far more promotions within that system. Significantly, none of these comments can be interpolated as advocating the unlikely viewpoint that GS employees will be safeguarded from unfair treatment in promotions while the WS workers promoted into the same jobs will still be subjected to such mistreatment.[12]

Finally, the Petitioner contends that in 1972, when Congress codified and standardized the Wage System, it tacitly endorsed the way the Petitioner applies the "highest previous rate" rule to those who were promoted into GS positions from WS positions because it approved the application of the rule to transfers and reassignments

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[10] Petitioner's Brief, p. 28.

[11] Petitioner's Brief, p. 29.

[12] The testimony of O. Glenn Stahl of the Civil Service Commission, relied on by Petitioner (Brief, p. 29, 30-31), is of little value in interpreting the statute. *March v. United States*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974). In any event, Mr. Stahl did not state, as the Petitioner implies he did, that Section 5334(b) is limited to promotions or transfers within the General Schedule. Mr. Stahl simply did not address the issue of whether the employees in their newly appointed GS positions must necessarily come from another GS position to be eligible for the two step increase. H.R. Rep. No. 1981, 86th Cong., 2d Sess. 2 (1960).

within the Wage System. (Brief, p. 31). The legislation under consideration at that time only involved the pay structure for WS positions; Congress was not considering the pay structure for GS positions. It is improper to convert this congressional action into an approval of governmental action which was not under consideration at the time. "[A]bsent some clear indication that Congress 'focused on the issues . . . directly related to the one presently before the Court,' . . . there is no basis for reading into its actions an intent to modify the plain meaning of the words" found in Section 5334(b). *Diamond v. Chakrabarty*, 447 U.S. 303, 314 (1980). (Citation omitted).

In summary, in enacting Section 5334(b) and its predecessor provision, Congress sought to prevent a previous inequity by ensuring that federal employees who accept promotions, with the attendant increase in duties and responsibilities, will be given at least a specified minimum salary increase. It is entirely consistent with the statutory scheme and congressional intent to reward employees who are promoted or transferred from lower Wage Schedule grades, as well as from lower General Schedule grades. The Petitioner has conceded that an employee who is promoted from one WS position to another is guaranteed a comparable benefit, as are the employees who cross over from GS positions to WS positions. (Pet. App. 7a-8a). Yet the Petitioner would have this Court believe—what the Court of Claims summarily rejected—that Congress intended to exclude from a guaranteed salary increase *only* employees promoted from WS positions to GS positions. Such an untoward result finds no support in either the language of Section 5334(b) or the public policies which prompted its enactment.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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